REPORT TO THE ATTORNEY GENERAL

BY THE POLICE COMMISSION

ON THE USE OF VIDEO EQUIPMENT

BY POLICE FORCES IN BRITISH COLUMBIA

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MINISTRY OF ATTORNEY GENERAL JANUARY 15, 1986

VICTORIA - Attorney General Brian R.D. Smith, Q.C., today announced that he has requested the British Columbia Police Commission to study, investigate and report to him with recommendations on the use of video equipment in the course of criminal investigations by police forces in the Province and the subsequent use in court proceedings of video recordings made in the course of such investigations.

The Attorney General expressed concern about whether acceptable procedures and guidelines are in place with a view to balancing the needs of combating serious and often organized crime on the one hand, and reasonable safeguards on privacy and anonymity of law abiding citizens on the other hand. The Attorney General said that he will look for this study to advise him on what reasonable steps could be taken to properly keep in balance those often competing interests.

The Attorney General expressed the view that this assignment, to be undertaken by the Provincial Police Commission, is a most timely one given legitimate questions that have been raised in public discussion following indication of the use of video recording devices by police forces in the provinces. Such a study is within the guidelines established for such a research project by the provisions of the Police Act as the matters to be considered fall within the bounds of law enforcement, crime prevention and policing throughout the province. The Police Commission has been asked to ascertain procedures used in other provinces of Canada in order to assist in the formulation of recommendations to be put in place in British Columbia. The

CHAPTER 1

INTRODUCTION

"...electronic visual surveillance invades privacy to a greater extent than any currently practiced police investigative technique."

S. Richard Arnold, "Electronic Visual Surveillance and the Right to Privacy: When is Electronic Observation Reasonable?"

In Victoria, B.C. over the course of one week in February, 1985, a remarkable event took place. Police in Victoria set out to surreptitiously record on videotape the sexual activities of a female prostitute and her male customers at a Victoria motel. The police were seeking to obtain the best evidence available to prove a charge of procuring (1) against the prostitute's employer, a woman named Arlie Blakely. Blakely was the proprietor of an "escort service" in the Victoria area which the police suspected to be a front for prostitution.

In order to view and record the sexual activities of the prostitute, the police obtained access to a room adjacent to the room frequented by the prostitute. A hole was bored through the wall and a pinhole lens attached to the camera. Videorecordings were then obtained.

The trial of Arlie Blakely took place in County Court, Victoria in November, 1985. The videotaped evidence of the sexual acts was never adduced although the prostitute and her customers were called as witnesses by the Crown to give testimony concerning the sexual acts. The trial of Blakely became a cause célèbre and was known as the "Top Hat" case, adopting the name of Blakely's escort service.

The "Top Hat" case was remarkable for two reasons. Firstly, it involved an egregious invasion of the privacy of a number of individuals. Secondly, the case has highlighted a conspicuous failing on the part of the legislators and particularly, Parliament, to bring the intrusive use of the video camera under some measure of control.

It has been well over a decade since the Criminal Code was amended to incorporate the provisions of Part IV.1 governing the interception of private communications and making the unlawful interception of private communications an indictable offence punishable by up to five years imprisonment. The "Top Hat" case is illustrative of the fact that legislation has not kept pace with advances in technology and particularly, the technology of surveillance. The matter needs redress.

TERMS OF REFERENCE

On January 15, 1986, the Attorney General of British Columbia, the Honourable Brian R. D. Smith, Q.C., directed the Police Commission to study the use of video equipment by police forces in the Province during the course of criminal investigations. The Attorney General expressed his concern with balancing the citizen's right to privacy against the need for the police to detect and curtail crime. The Attorney General requested the Police Commission to report to him in a timely fashion and make any recommendations deemed appropriate, including those for legislative change.

The Police Commission has found that notwithstanding the fact that police forces in the Western World have been using the video camera for many years in the course of investigating crime, there is virtually no legislation in place in any of the Western Democracies

governing this type of activity. This is remarkable when one considers that both Canada and the United States have detailed and comprehensive legislation controlling the interception of private communications by the police which is a less intrusive form of investigation than the videorecording of an individual's acts performed in a private setting. It is this situation that makes the Attorney General's direction to the Police Commission all the more timely.

THE STUDY

In embarking on its task, the Police Commission set out to determine what video technology is available to police forces in the Province of British Columbia and to what use this technology is being put. The Commission then commenced to gather information regarding the use of video equipment by police forces generally in other jurisdictions of both Canada and the Western Democracies. In furtherance of its mandate, the Commission met with a large number of police officers, Crown counsel, defence counsel, judges and legal academics to seek and obtain their views on the matter. Two public hearings were held in June of this year when members of the public were invited to come before the Commission and express their views and concerns.

FOCUS

The recommendations in this report take two directions. On the one hand, it is clear that the right to privacy in this country lacks sufficient safeguards when one considers the advanced technology available for surveillance purposes. It is true that the Charter of Rights and Freedoms exists to protect individual rights but the remedial provisions of the Charter by definition vest after an infringement has occurred. It is clear that legislation

is required to ensure that the right to privacy is adequately protected before an infringement occurs.

On the other hand, the government, when engaged in the fundamentally important task of law enforcement, requires the most advanced means and techniques available to investigate and curtail criminal activity. (2) Those charged with law enforcement responsibilities need the assurance that evidence obtained in the course of investigations will be admissible in subsequent court proceedings. Today, there is no assurance that evidence obtained by police involving intrusive video surveillance will be admissible in the course of a criminal trial. This is particularly so because of recent interpretations of the Charter of Rights and Freedoms by the Supreme Court of Canada. (3)

CONCLUSION

The Commission hopes that its recommendations will assist in bringing about the desired and necessary legislative changes to ensure that individual privacy is accorded the protections it requires. The imperative of privacy is of overriding concern in a free and democratic society. Without it, the free flow of ideas and information among individuals would be greatly hampered. This has never been stated better than by Arthur Shafer:

> "J. S. Mill has provided us with many of the standard liberal arguments for the psychological, sociological and political utility of individual privacy. As Mill points out, there is a close correlation between the availability of a protected zone of privacy and the individual's ability freely to develop his individuality and creativity. In a society which is frequently intolerant of or hostile to non-conformity, freedom from constant surveillance is an important precondition for the development of independent and critically-minded individuals. Diversity and

non-conformity will, in turn, promote the vitality and progress of society and contribute thereby to longrun utility." (4)

What is required is legislative change that is sensitive to the competing interests of individual rights and legitimate governmental concerns. A balance must be struck.

Footnotes

1. Blakely was charged, inter alia, with procuring as set out in s. 195(1)(a) of the Criminal Code. This section requires proof that sexual intercourse has actually taken place. R. v. Deutsch (1983) 5 C.C.C. (3d) 41 (Ont.C.A.).

2. This is certainly the view of the police, who regard their access to modern technology as a must:

> "Covert surveillance is now an important but carefully controlled aspect of the Unit's work. If a modern police force is expected to combat and detect 20th Century crime, then it must be allowed to implement and use most certainly under public scrutiny 20th Century methods."

H. V. D. Hugh Hallett and Michael Lofthouse, "Television in the Garden of England", in "The Police Chief", November, 1981 at p. 49.

3. See particularly Hunter v. Southam [1984] S.C.R. 145, R. v. Therens [1985] 1 S.C.R. 613, 45 C.R. (3d) 97 and Clarkson v. R. (1986) 50 C.R. (3d) 289.

4. Arthur Shafer, "Privacy: A Philosophical Overview", in Aspects of Privacy Law, edited by Dale Gibson, 1980, Butterworths, at p. 15.

CHAPTER 2

VIDEO TECHNOLOGY

"Enormous strides are still being made in what is after all a relatively new technology and this rate of development is reflected in a seemingly endless flow of new equipment."

C. J. Aldridge.

INTRODUCTION

The above quote is taken from a series of articles by C. J. Aldridge of the Police Scientific Development Branch, Sandridge, England in 1978. (1) Aldridge was referring to video equipment in that passage and his remarks about the rapid development of this technology are equally apposite today. To the uninitiated, video equipment is startling, both in terms of the state-of-the-art and its availability. For police forces, it is quickly becoming a valuable instrument for investigation. One police sergeant in New Hampshire has stated that video technology is the single greatest advance since the advent of fingerprint analysis.

The video system involves a television camera that can be coupled with a means of transmitting a picture to a monitor or screen some distance away. The method of transmission can be by way of a cable (known as a coaxial cable) that joins the camera to the screen or by means of radio or microwave transmitter that sends a signal to a receiver some distance removed (App. "A"). The result is a live picture reproduced on a screen permitting the viewer to observe events taking place at another location. The monitor is useful in situations where a video camera is to be installed in a specific location for a lengthy period.

This avoids the necessity of having someone present to operate the camera and permits the person viewing the targeted activity to remain in a remote and safe location. Fully automatic camera systems are readily available (App. "B").

When the video system is combined with a video recorder, a permanent visual record of the events viewed can be created. Unlike the conventional movie camera, the visual record is made on a cassette which allows for instant replay. These cassettes are typically compact and easy to store. This feature makes the video system very attractive to law enforcement agencies.

A video printer is available, which, at the touch of a button, will store and print the image projected on the screen allowing for immediate circulation of the picture of a person under investigation (App. "C").

When the scene being viewed is not being transmitted to a remote screen, police officers working in the field utilize a lightweight hand-held video camera with a built-in recorder using 8 mm cassette tapes (App. "D").

VIDEO EQUIPMENT

Numerous devices are available to assist in the efficient operation of the video system.

I. Lenses

Lenses have been developed which greatly enhance

the capability of the video camera, particularly in the area of surveillance. The most notable are the telescopic and zoom lenses, the low light lens and the pinhole lens:

(a) Telescopic and Zoom Lenses

By definition, these give the video camera the ability to see from afar. One demonstration of a telescopic lens seen by the Police Commission involved a photograph of a licence plate taken by a camera utilizing a telescopic lens from a distance of two miles. The numbers on the licence plate were clearly discernible.

Video cameras have been connected with a 4,500 mm lens which permits a police officer to view an individual in a telephone booth a mile away and determine which numbers the person in the booth is dialing. In these situations, the FBI have used lipreaders to determine what the caller is saying.

(b) Low Light Lenses

These lenses are aimed at facilitating the viewing of objects and events in situations of poor visibility. (2) One such lens is the Star Tron lens which, true to its name, enhances night time visibility by utilizing starlight or other available light which it magnifies or enhances some 40,000 times, thus making night viewing a reality. Numerous similar items under various tradenames are marketed by different companies (App. "E"). An example of these is a night vision viewer produced by Meyers and Company and known as the "Dark Invader" which enhances light 55,000 times and, according to an advertisement, permits the viewing of "...sharp detailed images in ultra-low light and in total darkness" (App. "F"). Other low light lenses employ an infra red beam which, when viewed through the camera, has a similar effect to that of a flashlight, although the subject viewed would be unaware of the infra red beam. Infra red light is also used to facilitate night vision equipment and an example of this is the "Lightning Bug" which, according to the advertisement, "...easily penetrates most types of clothing, fabrics, vegetation, cardboard, styrofoam and water to a limited depth." (App. "G")

If fiber optics are being used, a light amplifier can be placed between the lens and the camera

which, again, permits viewing in a situation of darkness.

The latest development in low light technology is thermal imagery. This does not require any light to be present but operates on measuring differences in the temperature of objects of up to one-fifth of a degree Celsius at a distance of one thousand meters. This technology is referred to as forward-looking infra red or F.L.I.R. (App. "H"). It is used by the Coast Guard as it is capable of picking up images through cloud cover and smog. A number of U.S. police forces, including the FBI, the Delaware State Police Department, the New York Police Department and the Georgia Bureau of Investigations use F.L.I.R. technology. At present, the cost of this equipment is excessive but with the development of further technology, it is anticipated that the price will drop dramatically by the early 1990's. (3)

(c) Pinhole Lenses

These allow for "extremely discreet surveillance" (App. "I"). This lens is designed to permit viewing through a hole slightly less than one-tenth of an inch in diameter, a hole roughly the size of the tip of a ballpoint pen.

Special Services Co. of Garland, Texas, a company that supplies video surveillance equipment, has a pinhole lens that requires a hole one-eighth of an inch in diameter to permit adequate viewing.

II. Time-Date Generators

This is a specialized device that superimposes the date and time directly onto the videotape. As videotape is electronically spliced, only the highly trained eye can detect alterations. By using a time-date generator, it is easy to determine if a tape has been edited.

III. Time Lapse Video Cassette Recorder

This is particularly useful for situations involving lengthy surveillance. The time lapse recorder can be set to various speeds depending on the length of time of surveillance. The longer the period of surveillance, the

slower the frames must be. If the time lapse recorder is set for one day, there would be one frame every five seconds; for two days, one frame every ten seconds and for ten days, one frame every five minutes. To bring the camera to standard recording time, a video motion detector (4) (App. "J") or door magnet can be installed which will cause the camera to speed up when the detector is stimulated. An arbitrary time setting on the equipment can then cause it to return to its original time lapse sequence after a set period of recording. The maximum recording time on a single one-half inch VHS video cassette is four hundred and eighty hours or twenty days. Simultaneous audio recording is also available.

IV. Miniaturization

This is probably the most remarkable aspect of the video system. Utilizing advances in microchip technology, manufacturers have developed cameras that are surprisingly small. The smallest of these is the Thompson CFF manufactured in France. This camera, including power supply, measures one and a half inches by one and a half inches by one inch. The problem with it is that it only provides two hundred lines of resolution. It is the number of lines of resolution that determines the acuity and quality of the picture. Nevertheless, the picture is discernible. (5)

Another miniature camera weighs 4.1 ounces and measures one and one-eighth inches high by one and eleven-sixteenth inches wide by two and seven-eighth inches deep. Such a camera can easily be held in the palm of one's hand. There are a variety of miniature cameras available in the marketplace (App. "K").

Special Services Co. has installed a video camera

in a briefcase coupled with a pinhole lens requiring a hole one-eighth of an inch in diameter in the end of the briefcase. The camera used is two inches by two inches by seven inches and when coupled to a fifty milliwatt transmitter, enables the transmitting of both audio and video signals to a distance to three-quarters of a mile (App. "L"). The same company has concealed a Thompson CFF miniature camera in a beltbuckle using an angular lens. (6) Although this causes some discomfort, it is an effective means of surreptitious video surveillance.

What is most surprising about miniature video cameras is that they have been available in one form or another since 1973. (7)

V. Fiber Optics

Fiber optics stand at the far horizon of advanced video technology:

> "This technology employs a small bundle of thin, transparent and flexible fibers called a 'lightpipe' which can conduct light or visual images from one end of the bundle to the other even when the fibers are twisted or completely coiled up. At one end of the pipe is a lens and at the other, a television camera which can be located at a convenient distance from the area under surveillance. Only the lens need actually intrude into the target area and its presence can be easily concealed. There are few places into which an expertly installed lightpipe cannot intrude." (8)

The fiber optic has a diameter similar to that of a pencil lead. This can be either rigid or flexible. Rigid fiber optics can be used to run through a wall to a miniature lens that is easily concealed in the targeted room. Such small lenses have been used in place of the screw of a light fixture or simply disguised by the pattern of the wallpaper.

Flexible fiber optics can be run through a ventilation system, again using a miniature lens. The methods of concealment and utilization of such technology are limited only by the bounds of the imagination. Special Services Co. has designed a system that runs a flexible fiber optic up a hollow car antenna, at the top of which is a miniature right angle lens. The camera is mounted inside the wheelwell. (9) (See also App. "M".)

COST

As technology advances, costs tend to decrease. Whereas the capital outlay required by a police force to obtain advanced video systems may have been prohibitive a decade ago, the acquisition of some form of video system is now well within the reach of most police forces. A Panasonic closed circuit television system without a video cassette recorder but including two mini cameras, one monitor and one switcher retails for approximately $1,400.00. The cost of a Sony video system, including an 8 mm camera recorder (camcorder) is as follows:

portable video camcorder - 8 mm 8 mm player/recorder carrying case AC power supply rechargeable batteries	$ 3,349.70
accessories:	
small portable 8 inch colour AC/DC monitor rechargeable batteries	$ 1,550.00
or	
colour industrial monitor 20 inch screen	$ 1,695.00
or	
colour television 20 inch screen	$ 759.95
or	
black and white video printer	$ 1,545.00

Experiments in Canada, the United States and Great Britain have proved that video systems are a cost-effective innovation which, in the long run, can save manpower in court and on patrol. (10)

CONCLUSION

In a recent report by the Office of Technology Assessment of the U.S. Congress, the authors noted:

> "New surveillance tools are technically more difficult to detect, of higher reliability and sensitivity, speedier in processing time, less costly, more flexible and adaptable, and easier to conceal because of miniaturization and remote control." (11)

The Police Commission agrees with this assessment. However, as such technology becomes increasingly available to police forces, the potential for abuse increases. Attention must therefore be focused on the management and control of this advanced surveillance technology. It is acknowledged that this technology has the capacity to provide greater security for society as a whole, but this benefit must always be measured cautiously for there are inherent dangers which are not so readily apparent. As the Office of Technology Assessment further stated:

> "Over time, the cumulative effect of widespread surveillance for law enforcement, intelligence, or other investigatory purposes could change the climate and fabric of society in fundamental ways." (12)

We must be ever vigilant not to let technology outstrip control. (13)

Footnotes

1. C. J. Aldridge, "The Use of Television by Police", in "Police Research Bulletin", Vol. 31, Autumn, 19[illegible].

2. Merwyn Simpson of Special Services Co. in Garland, Texas, a company which markets video surveillance equipment, has stated: "Image intensification night vision equipment is one of the high tech items that is proving very useful to law enforcement agencies."

   Mr. Simpson was helpful in providing the Police Commission with material and information regarding the type of video equipment and accessories available in the marketplace.

3. Ronald Spetifore of Special Services Co., Garland, Texas, advises that the excessive cost is due to the fact that one of the components of the F.L.I.R. camera must be cooled to a temperature of approximately minus 200 degrees Celsius. Technology is presently being developed to permit the F.L.I.R. camera to operate with "uncooled technology". When this is done, it is anticipated that the price will drop drastically.

4. In a thoughtful article entitled "The Admissibility of Videotapes as Real Evidence: An Analysis of Regina v. Taylor", Susan C. MacLean, Assistant Crown Attorney, Durham, Ontario, has described the functioning of the video motion detector as follows at p. 6:

   > "A motion detector is a contrast analyzer which detects a change in the video information. The equipment works as follows: When motion occurs and the contrast appearing on the video screen changes (i.e., a change in the black-grey-white image), the motion detector device analyzes the contrast and this change causes the motion detector to 'alarm out' which triggers the recording mechanism on the videotape machine."

5. Supra footnote 2.

6. Ibid.

7. David P. Hodges, "Electronic Visual Surveillance and the Fourth Amendment: The Arrival of Big Brother?" (1976) 3 Hastings Constit. L.Q. 261. The

camera was hand-held, measured three inches by two inches by one inch and weighed six ounces. More sophisticated cameras were being introduced constantly.

8. Supra footnote 7 at p. 267.

9. Supra footnote 2; Cars have also been fitted with surveillance equipment without the necessity of using fiber optics. JAI, a Danish firm which produces and markets video equipment, has produced a system suitable for automobiles (App. "M").

10. The police force in Bedford, Massachusetts, a small town with a population of approximately twelve thousand, originally purchased a video unit to support an anti-drunk driving campaign. This force reports that the unit paid for itself in less than six months. Sgt. Herb Pike of the Bedford Police states: "We figure that we have paid for our video equipment just in court time savings alone. Of all the cases we have taped, not one has been contested. Many defendants are pleading out, and that saves two or three hours of our officer's time at overtime rate." "Law Enforcement Technology" magazine, October/ November, 1985, pp. 17 & 18.

In the Halton Study, Professor Alan Grant, has concluded that the police budget costs involved in the videotaping process, when viewed in the context of the total police budget, do not appear to be a significant factor in deciding whether to implement a project of this sort. They have found that the audio-visual equipment has been functioning well, with no reported cases of mechanical failure. Further, maintenance requirements on the equipment have been negligible. After one year of the project, it has been found that the videotaping process has saved court time through increased guilty pleas and waivers of voir dires, after defence counsel has viewed the tape. Halton Regional Project: Second Interim Report, (cumulative) June 30, 1986.

11. "Electronic Surveillance and Civil Liberties", Federal Government Information Technology, Office of Technology Assessment, Congressional Board of the 99th Congress at p. 11.

12. Ibid at p. 11.

13. Or as Mr. Justice Clark of the United States Supreme Court said in Berger v. New York, 388 U.S.

41 at p. 49: "The law, though jealous of individual privacy, has not kept pace with these advances in scientific knowledge."

CHAPTER 3

THE USES OF VIDEO TECHNOLOGY BY POLICE - GENERAL

"As television equipment has become more reliable and easy to use, so the range of possible applications to police work has increased."

C. J. Aldridge Police Scientific Development Branch, Sandridge, U.K.

INTRODUCTION

The use of video equipment by police forces in the Western World is a comparatively recent development, although the groundwork was laid some years ago. In England, the Kent County Constabulary has been using "television" equipment since 1973 for both training purposes and for investigating criminal activity. (1)

A recent Ontario based study and evaluation of the use of video equipment in the filming of police interviews of suspects (2) was prompted in part by the revelation that a police unit in Buffalo, New York had been videotaping the interviews of homicide suspects for years using antiquated equipment and borrowed tapes, but to very great effect. (3)

In 1973, a closed circuit video camera was surreptitiously installed in a room at the Holiday Inn in London, Ontario for the purpose of securing evidence to establish a charge under s. 185(1) (keeping a common gaming house) of the Criminal Code. (4)

This decade has seen a burgeoning use of video equipment by police for a variety of purposes. In 1980, police in Calgary, Alberta utilized a video camera to record an accused murderer's re-enactment of a crime and this videotaped re-enactment was subsequently admitted as

evidence at trial. (5) A similar videotaped re-enactment was conducted by the Matsqui Police in British Columbia in 1983 during a murder investigation. In admitting the videotaped evidence at trial, Dohm, J. referred to it as "a pictorial confession". (6)

There is no doubt that the video camera can be an extremely effective law enforcement tool covering a wide range of uses. (7)

CATEGORIES OF VIDEO USE BY POLICE

Surveillance

(a) Covert Surveillance

This type of surveillance, often referred to as surreptitious surveillance, occurs when the object of the surveillance has no knowledge, or is intended to have no knowledge, that he is being observed. Some examples of covert surveillance include:

(i) Recording the movements of a suspect for later reference. In this sense, the video camera is creating "electronic notes". (8) By recording the movements of suspects and the places they have resort to as well as routes used to move from one place to the next, meeting places can be identified and kept under close surveillance to assist police strategy.

(ii) Recording the activities and movements of suspects for later use as evidence at trial to demonstrate that a particular activity or movement took place on a certain date. (9)

(iii) Recording the activities of groups or organizations involved in labour disputes, political protests or at public events. The use of the video camera in this context is to assist in later identifying the conduct of an individual or group of individuals in a crowd

setting. (10)

(iv) Recording a crime in progress. (11)

(v) Recording the arrest of suspects. This assists in later identification and also creates a record from which it can be clearly ascertained whether there was misconduct or excessive physical force by police in effecting the arrest.

(vi) Recording the movements of suspects and the places that they have resort to in order to gather sufficient material to put before a Justice of the Peace to obtain a search warrant or to put before a Supreme Court Judge to obtain a wiretap authorization.

(vii) Recording the conduct of persons acting in private whose activity, although not unlawful per se, will provide evidence to be used at the subsequent trial of a third party. (12)

This is not an exhaustive list but indicates the varied uses of the hidden video camera. It is also apparent that some of the situations described above (particularly (iii) and (v)) could also be recorded by a video camera that was being used openly.

The Police Commission has determined that with available technology, the video camera can be easily concealed or placed in such a position as to give a clear field of vision without its presence being detected. Moreover, the camera does not have to be manned. Once mounted in a fixed location, it can be activated by a motion detector (for instance, a motion detector attached to a hotel room door). With the camera in place, an observer can monitor the situation under surveillance from a remote location.

The material gathered by covert surveillance creates a record of conduct or activity which can be later used in many aspects of an investigation. The video camera creates a graphic and detailed record of the events it

records.

(b) Overt Surveillance

The unconcealed use of the video camera can be an extremely effective law enforcement tool. Overt uses include:

(i) Acting as a deterrent to unruly or riotous conduct, particularly involving crowds. It is believed that the open and visible use of a video camera at a crowd scene has a significant effect in deterring this type of conduct. (13)

(ii) Recording the arrest of suspects, particularly in situations involving gatherings of persons engaged in questionable activities, such as the occupation of government offices. Here, the camera precisely details the manner of the arrest and creates an accurate record of the arrest procedure.

(iii) Recording the activities of persons entering and conducting their affairs in financial institutions. (14)

(iv) Providing surveillance of areas to which the public has access (such as parking lots and public garages) where certain types of offences tend to be committed. (15)

(v) Providing surveillance in prisons and remand centres (particularly in areas where prisoners tend to congregate) and jail cells, including booking areas and holding cells.

Overt surveillance can perform many of the functions of the hidden camera but has the added feature that its presence can provide a significant deterrent.

The video camera also has the advantage of increasing the response capabilities of security staff at places where a large number of people gather. At Expo '86, nine video cameras were mounted at varying locations throughout the site focusing on main assembly areas which

were potential trouble sites. (16)

Crime Scenes

The video camera is the best method available to accurately record the detail of a crime scene. A complete record can be created for later use at trial. Crime scenes can be videotaped at the time of the initial investigation or at a later date to demonstrate such things as lines of sight. Video applications to crime scenes include:

(a) Present Crime Scenes:

The video camera records the crime scene as it exists when first observed by the investigator. This record benefits both the Crown and the defence in that detail is preserved before the ongoing investigation disturbs the physical setting. The videotape gives a perspective and overview that escapes the still photograph, yet, where necessary, scenes from the videotape can be isolated and a subsequent photograph rendered for specific viewing.

(b) Post Crime Scenes:

This use of the video camera is aimed at establishing such things as lines of sight in order to demonstrate the visual capability of a potential eyewitness. Again, this use of the video camera is of equal assistance to both Crown and defence. The one caution is that great care must be employed not to distort the picture or create a false impression. Added features such as a zoom lens could be inappropriate to this application of the video camera.

The utility of the video camera in recording crime scenes is obvious. Trained investigators and specialists, such as forensic pathologists, are not always available to view the actual crime scene and in giving opinion evidence at trial, must rely on the record created by the police officers first in attendance. The video camera preserves the crime scene as it appeared at the time and recreates it

for subsequent viewing by such specialists. This will tend to yield greater accuracy in the opinions expressed by these experts. (17)

Crime Re-enactments

The landmark Canadian case on re-enactments is that of R. v. Tookey and Stevenson (18) in the Alberta Supreme Court which was followed in British Columbia in 1983 by the case of R. v. Simpson. (19) Both cases involved an accused person acting out the crime for the video camera. Such re-enactments create a graphic, if sometimes chilling, picture. (20) The one danger inherent in such an exercise is that it may not be possible for the accused to minutely replicate his acts or those of the victim, (21) particularly in situations where drugs or alcohol played a role. Apart from this drawback, the videotaped re-enactment of a crime by an accused creates a graphic and potentially more reliable recounting of the events than an oral confession.

Lineups

Evidence of identification by eyewitnesses at police lineups is adduced by the Crown in criminal trials by the use of verbal testimony coupled with still photographs of the lineup procedure. There is no reason why this evidence could not be adduced through the more accurate medium of the video camera. A complete record could be made commencing with the investigating officer's directions to the potential eyewitness, following through to the recording of the lineup procedure and the marking of the ballot by the witness.

Lineups are often an intregral part of a police investigation and if conducted properly, become cogent evidence of identification by a prospective eyewitness. (22)

The efficacy of any lineup identification procedure is largely dependent on the assumption that the potential eyewitness has not been influenced or biased. Correct employment of the video camera can assist in ensuring that undue influence has not taken place.

A further use of the police camera is to record a lineup when a potential witness is not initially available. The videorecorded lineup is preserved for subsequent presentation to the absent witness. This procedure is similar to a photo lineup but has the added advantage of giving the witness a far better opportunity to observe the physical characteristics of the persons in the lineup than is possible from a still photograph.

Preservation of a Witness' Testimony

The video camera may be used to record the testimony of a witness who will be unavailable for trial. Evidence is taken as commission evidence and the proceedings are recorded. Such a procedure was authorized by the B.C. Supreme Court in the case of R. v. Pawliw. (23) In that case, a major witness for the Crown had travelled to the United States and gone into hiding for fear of reprisal from the three accused. As the witness was in the United States, there were no means available to the Crown to compel her attendance at trial. On a pretrial application by the Crown, Murray, J. ruled that the witness' evidence could be taken by means of commission evidence which would be video recorded for later presentation at trial. This unique procedure involved an importing of civil rules and procedure into the criminal law and was viewed as an innovative remedy to a difficult problem. In fact, this procedure was never implemented as the witness eventually agreed to attend the trial once she was satisfied that sufficient security measures had been put into effect. Notwithstanding this, a

unique precedent had been set.

A similar procedure would be to videotape the testimony of a witness at a preliminary inquiry when it was known that the witness would not be available for trial. The Criminal Code presently allows for a witness' evidence given at a preliminary inquiry to be read into the record at trial where the witness' absence is due to certain specified reasons. (24) To introduce the evidence of a missing witness at trial by means of videotape would seem a much more suitable procedure than to simply read the transcript of the evidence into the record because the former method would allow the trier of fact, be it judge or jury, to view the demeanour of the witness under direct and cross-examination. (25)

Witness Interviews

Witness interviews conducted by either the Crown or the police can be recorded on videotape as a means of creating an accurate and vivid record of evidence available to the Crown. This has particular utility in cases involving sexual assault and abuse of children of tender years. At a later time, but before trial, defence counsel may be given the opportunity to review the videotaped material which may assist in assessing the veracity of the witness and thus, in making a more informed decision as to how to proceed with the case.

Videotaped interviews of witnesses can also be used for viewing by psychiatrists and psychologists or other experts who may be asked to express an opinion on the mental or emotional state of the witness.

Confessions

In the course of many criminal trials, a voir dire

is held to determine the admissibility of an accused's statement to the police. Invariably, attacks are launched by the defence at the police conduct in obtaining a confession and it is often suggested that the police were intimidating, oppressive or coercive. The Police Commission reviewed videotapes of actual interrogations of suspects carried out in both the United States and Canada.

In the United States, the procedure often involves a close questioning of the accused by a District Attorney or police officer. For some reason, the American videotapes were often done in black and white. Moreover, the camera work was not always good, on occasion failing to demonstrate who was present in the interview room and the relative positions of the accused in relation to those conducting the questioning. In each situation, however, great pains were taken to advise the accused of his constitutional rights and to emphasize to him that if he chose to make a statement, it must be a voluntary decision on his part.

The Canadian experience in videotaping confessions, apart from the re-enactments of crimes, is largely derived from two studies commenced in 1985 in Ontario, one being carried out by the Metropolitan Toronto Police Force (26) and the other, by the Halton Regional Police Force (27) and from the experience of the Edmonton Police Force, who have routinely used the video camera to record confessions. (28)

The Halton project is being conducted under the auspices of the Law Reform Commission of Canada by Professor Alan Grant of Osgoode Hall Law School. The Police Commission has had the benefit of reviewing both the interim report from Professor Grant published in December, 1985 and the subsequent report published in September, 1986. The results of the study demonstrate that the video camera is an

extremely useful tool in interviewing suspects.

THE HALTON PROJECT

This project is aimed at determining the role videotape technology can play in improving the administration of justice by providing a full electronic record of police interviews of suspects.

The procedure involves advising the suspect that it is the policy of the police force to videotape statements. If the suspect declines, the videotaping is discontinued. If the suspect agrees, a camera in a fixed position with a zoom lens is used. A split screen technique is used to bring a closeup of the suspect's face to disclose his apparent emotional state, as well as any injuries or distinctive marks, such as tattoos. All filming is done in colour.

The interviews take place in a room with the police officer sitting across a table from the suspect. The chairs are fixed to the floor to ensure that a comfortable distance is maintained between the participants.

Once the interview has been concluded, the tape is provided to Crown counsel but no transcription occurs at this time. Defence counsel are encouraged to view the videotape prior to hearing and a copy of the tape will be supplied to the defence upon request and at minimal cost.

One result of this project has been to reduce the stress upon police officers who often find the task of presenting evidence in a voir dire an arduous one. Moreover, the police have become very enthusiastic about the project and tend to spend more time preparing for interviews knowing that their performance may later be viewed by the

court. As well, because the matter is being videorecorded, there is no need to make notes, allowing the officer to remain one step ahead of the suspect during the interview.

Before the project began, a concern was expressed that the videotaping process would inhibit suspects from making confessions or admissions. In fact, the results of the study have shown that the opposite is true. There appears to be a tendency or disposition in suspects to give a statement when being filmed. In a communiqué released by the Law Reform Commission on February 17, 1986 with respect to the first interim report on the Halton project, Law Reform Commission President, Mr. Justice Allan M. Linden, stated "It's too early to tell why persons accused of crimes open up on camera even after being told that they may exercise their right to remain silent. Some say it may be because there is a bit of ham in all of us! I rather suspect that it is because the accused persons trust the camera. They know that a full, fair and accurate record will be made of everything that is said during the questioning, and not just that which favours the prosecution."

One benefit of the study has been the cost saving in court time. The Crown has found that videotaped confessions have lead to more guilty pleas after the defence has viewed the tapes. A further benefit is that if a transcription of the videotaped interview is required, it is an easier task for the reporters to be more accurate as they can view the lips as well as listen to the words spoken. Yet a further benefit involves the ability of psychiatrists and psychologists to review the videotape to assist in giving their opinion as to fitness or other mental states.

In a communiqué released August 6, 1986, the Law Reform Commission of Canada referring to the Halton project,

stated: "Videotaped questioning greatly enhances courts' ability to assess the credibility and voluntariness of statements taken from criminal suspects". This observation is derived from the Halton project second interim report. (29) Some of the observations noted in the second interim report are the following:

> "Crown counsel indicate that there have been no problems in having the tape introduced into evidence in the few cases which have actually reached court.
>
> Maintenance requirements on the equipment have been negligible.
>
> The police budget costs involved in the videotaping process, when viewed in the context of the total police budget, do not appear to be a significant factor in deciding whether to implement a project of this sort. (30)
>
> Defence counsel practicing in the Halton Region are very positive about the videotaping project. They are much satisfied that videotaping provides a more accurate account of an interview than do traditional police note-taking practices, about which defence counsel still have reservations.
>
> In the view of defence counsel, the accuracy and reliability of the videotaped interview outweighs any disadvantage or prejudice to defendants that may arise in some cases through a judge or jury seeing them as they appeared when interviewed as opposed to how they appear at trial." (31)

It is clear that the Halton project has set the groundwork for a major innovation in police interviews of suspects. As Harold Levy of the Law Reform Commission stated: "The Halton project is revising the psychology of questioning."

EDMONTON POLICE DEPARTMENT

The Edmonton Police Department makes wide and effective use of the video camera which can be broken down into four areas.

Interviews of Suspects

This police force videorecords the interviews of homicide suspects by use of a concealed camera. The person being questioned is not informed that a recording is being made. A Sony CCD-G5 camera is employed using a wide angle lens. The police department explains that: "...(T)he 'wide angle' setting of the lens is as objective as it can be and, because the position of the camera is fixed, we cannot be accused of attempting to 'highlight' an interview with 'reaction shots', etc." (32)

The procedure involves an interviewing officer who is charged with maintaining possession and continuity of the videotape. This officer places a new videotape into the recorder and switches it on immediately prior to entering the interview room. The scene is then monitored by a second officer who is required to place a second cassette in the recorder if the interview exceeds one hundred and twenty-five minutes, the length of the tape. The situation is controlled in that if during the interview, the suspect is left unattended or is speaking to a third party who is not aware of the recording and has not signed a waiver form, the equipment is switched off.

The Edmonton Police also have two separate interview rooms for polygraph examinations and both of these are equipped with video cameras. Again, these cameras are concealed, one using a right angle pinhole lens. Although both of these cameras are connected to video monitors, neither have recording facilities, although the audio portion is recorded. The purpose of the hidden cameras and accompanying monitors in the polygraph rooms is to permit a second member of the polygraph detail "...to observe 'body language' and to listen for 'revealing' information that

might be of value to the examiner." (33)

The Edmonton Police note that since they have employed the video camera to record interviews, the court time spent on voir dires in determining the admissibility of statements has been greatly reduced.

Recording Crime Scenes

The Edmonton Police use the video camera to record major crime scenes and other matters such as demonstrations, traffic fatalities and disasters. A Sony CCD-V8 portable video camera recorder is used and "...(H)omicide Unit 'Recordists', who are completely familiar with the equipments, functions and operation, are the only persons authorized to operate the equipment." (34)

The Edmonton Police state that "...no dramatic use of the camera will take place, eg., zooms, dramatic angles or lighting. The scene is shot as though the camera were a third party in a group being shown the scene." (35)

Recording Re-enactments of Crime

This is done by the Homicide Unit "Recordists" where the accused has agreed to return to the scene and demonstrate the crime in front of the video camera.

Surveillance

Surveillance is carried out by the Technical Support Unit of the Criminal Investigations Division. A Staff Sergeant in charge of the unit is responsible for evaluating and approving requests from investigators for video surveillance. Three cameras are available, two with lower light level functions and one for difficult lighting

situations. Various lenses are available, including a telephoto lens and a nine millimeter pinhole lens. A video cassette "time lapse" recorder is available with the capacity to record two hundred hours on a two hour tape. A video motion detector is also employed. The recorder also has a time-date generator. The Edmonton Police point out that although the recorder has the capability of recording sound when used in the real time mode, "...this feature is not used because of Privacy Act legislation." (36)

As far as installation is concerned, "...every effort is made to ensure covert operations do not bring police practices into disrepute. The area identified in the premise where equipment is installed is most important, i.e., police would not routinely install video equipment in bedrooms. On the other hand, an installation in a public washroom during an investigation into a complaint of gross indecency has taken place. In this case, live monitoring of peoples' feet in toilet compartments was adequate to detect when more than one person was in a compartment and from the angle of the feet therein that something was happening." (37)

It is apparent from the information obtained that the Edmonton Police have access to a significant variety of video cameras and equipment and employ it as a matter of routine. This represents an excellent illustration of the practical use to which the video camera can be put by a police force in its day to day operations.

CONCLUSION

The foregoing represents a comprehensive but not all-inclusive list of police uses of the video camera. Other uses involve video as a training tool for the police, for example, in simulating a high speed chase. The camera may

also be used to film impaired drivers in order to present demonstrative evidence at a subsequent trial. (38) Simply stated, there is a multiplicity of uses to which the video camera can be put and the frequency of use of video equipment by police is rapidly increasing. (39)

What started with the tentative use of the video camera as a recording device and investigative tool has developed into a broad range of uses of the camera in the development of investigative techniques.

Footnotes

1. H. V. D. Hallett, "All-Out Video; England's Top Police T.V.", in "Law Enforcement Communications", January/February, 1984; see also C.J. Aldridge, Police Scientific Development Branch, Sandridge, U.K., "The Use of Television by Police", in "The Police Research Bulletin", No. 31, Autumn 1978.

2. "The Audio-Visual Taping of Police Interviews with Suspects and Accused Persons by Halton Regional Police Force, Ontario, Canada; An Evaluation", First Interim Report by Professor Alan Grant, Osgoode Law School, December 31, 1985 (prepared for the Law Reform Commission of Canada).

3. This information was supplied to the Police Commission by Harold Levy, then acting Secretary and Counsel to the Law Reform Commission of Canada.

4. R. v. Irwin and Sansone et al (1973) 32 C.R.N.S. (3d) 398.

5. R. v. Tookey and Stevenson (1981) 29 A.R. 175.

6. R v. Simpson, unreported, B.C. Supreme Court, November 23, 1983, New Westminster.

7. "Hidden video installations can be used to provide corroborating photographic evidence of any criminal activity. This evidence is difficult to refute and often is a major factor leading to a guilty plea. The technique maximizes protection for covert agents since it permits personnel assigned to the surveillance to monitor continuously the transaction. Also, if necessary, accompanying conversations can be placed on the audio track of the videotape. These techniques have been used extensively in investigations involving narcotic violations, conspiracy to commit murder, burglaries and other felonies." R. E. Burwitz, "High Technology Surveillance", in "The Police Chief; The Professional Voice of Law Enforcement", Vol. L, No. 4, April, 1983 at p. 56.

8. Op. cit. footnote 2, p. 9.

9. For example, see R. v. Biasi et al (No. 3) (1982) 66 C.C.C. (2d) 566.

10. The Vancouver Police Department conducted video surveillance of the Pennyfarthing labour dispute

in the spring of 1984 and also used the video camera to record the conduct of crowds and individuals in the Memorial Park riot in 1982. The Police Commission notes that it is not always unlawful conduct that is videorecorded. From time to time, video surveillance is carried out with respect to political rallies and protests. The Police Commission received a number of comments from persons concerned with the police or other governmental agencies filming or videorecording the activities of individuals engaged in the exercise of their democratic rights. (Note also s. 2(c) of the Charter of Rights and Freedoms which grants the fundamental freedom of peaceful assembly.)

11. In R. v. Kathleen Mary Taylor, a June, 1983 case from the Ontario Provincial Court summarized in Elliott Goldstein, Goldstein on Videotape and Photographic Evidence, 1986, Western Legal Publications, Vancouver, B.C. at pp. 12-98, a hidden video camera was used to film the working area of a public library which had been the scene of a series of incidents of vandalism. A camera recorded the actions of the accused, a disgruntled library employee, damaging library property.

12. R. v. Blakely (the "Top Hat" case), Victoria County Court, November, 1985.

13. The Vancouver Police Department advised the Police Commission that they have used the video camera effectively in this manner.

In referring to the deterrent capability of the video camera, H. V. D. Hugh Hallet and Michael Lofthouse have stated:

> "It is most effectively employed as a deterrent when covering large areas subject to specific crime...
>
> Its deterrent and policing capabilities cannot be too highly stressed."

"Television in the Garden of England", in "The Police Chief", November, 1981 at p. 49.

14. Video cameras and/or "Frisco Bay" cameras are used by most major banks. These tend to be in fixed positions with swivel mounts designed to maintain a record of all persons entering a bank during business hours.

15. Parkades or parking garages seem to be a frequent scene of sexual assaults. This has been commented on by Nemetz, C.J.B.C. in the case of R. v. Schwab, unreported, Reasons for Judgment, B.C. Court of Appeal, Vancouver, September 9, 1980 where at page 2, the Chief Justice stated: "It is my view that, as far as possible, the court should categorize these crimes and make it clear to these people who are victimizing people in underground garages or parkades that this will not be countenanced".

16. The Police Commission met with Expo security staff who advised that the video cameras had been put in place to assist with crowd control and to facilitate emergency response. Given the nature of the Exposition and recent worldwide terrorist activities, there was concern for the safety of political figures visiting Expo.

17. The Police Commission has reviewed videotapes of a number of crime scenes and regards the use of the video camera in this area as one that could be put to great advantage by police forces in this Province.

18. Supra footnote 5.

19. Supra footnote 6.

20. R. v. Simpson (supra footnote 6) involved the brutal sex slaying of a young Abbotsford woman in a hangar at the Abbotsford airport. The video-taped re-enactment was performed in a matter-of-fact manner by the accused and had a significant impact when played at the accused's trial on a charge of first degree murder.

21. In R. v. Quinn; R. v. Bloom, (1961) 3 All.E.R. 88, the court rejected evidence of a filmed reconstruction of an alleged crime that was being tendered on behalf of the defence: "It is obvious that to allow such a reconstruction would be introducing a method of proof which would be most unsatisfactory for the reason that it would be almost impossible to analyze motion by motion those slight differences which may in the totality result in a scene of quite a different character from that performed on the night in question." Ashworth, J. at p. 257.

22. In R. v. Swanston (1982) 25 C.R. (3d) 385, the B.C. Court of Appeal held that even though a witness could not identify an accused person at

the time of trial, prior extrajudicial identification of the accused by the same person in a lineup was admissible as independent evidence going to the issue of identity.

23. Unreported decision of Mr. Justice Murray, B.C. Supreme Court, December 10, 1984, summarized in 13 W.C.B. 200.

24. S. 643(1) of the Criminal Code of Canada provides as follows: "Where, at the trial of an accused, a person whose evidence was given at a previous trial upon the same charge, or whose evidence was taken in the investigation of the charge against the accused or upon the preliminary inquiry into the charge, refuses to be sworn or to give evidence, or if facts are proved upon oath from which it can be inferred reasonably that the person (a) is dead, (b) has since become and is insane, (c) is so ill that he is unable to travel or testify, or (d) is absent from Canada, and where it is proved that his evidence was taken in the presence of the accused, it may be read as evidence in the proceedings without further proof, if the evidence purports to be signed by the judge or justice before whom it purports to have been taken, unless the accused proves that it was not in fact signed by that judge or justice or that he did not have full opportunity to cross-examine the witness."

25. This procedure has actually been used in the United States. The Police Commission was able to review videotaped examples of this and other procedures that had been supplied to the Commission in the course of this study.

See also John E. Shapard, "Recommendations Regarding Use of Court Owned Videotape Equipment in Federal District Court Litigation", Federal Judicial Centre, February, 1984. This paper reviewed a project studying the use of videotape as a medium for recording court testimony in five U.S. District Courts.

26. Metro Toronto "Pilot Project on Videotaping Statements" commenced February 11, 1985. This project involves investigating several applications of the use of video equipment by police. By letter dated February 28, 1986 to the B.C. Police Commission, R. P. Lynn, acting Deputy Chief of Police, advised that "The first category involves the use of video equipment in recording and monitoring a prisoner's behaviour while in

custody, and receiving statements for selected criminal offences. The second area relates to the use of video surveillance in the investigation of criminal activities."

27. Op. cit. footnote 2.

28. Information regarding the Edmonton Police Department's use of video equipment was supplied to the Police Commission by Superintendent L. Chahley of the Criminal Investigations Division by letter dated March 19, 1986.

29. Halton Regional Project; Second Interim Report, (cumulative) June 30, 1986.

30. There were early concerns that costly professional camera crews would be necessary to carry out the Halton Project. This was simply not so for during the six month period immediately preceding the commencement of the project, all platoon and criminal investigation branch officers involved in the project were provided training in the use of video equipment. Supra footnote 27 at pp. 8-9.

The actual cost of the Halton Project is set out at page 10 of the report (supra footnote 27):

> "Two interview rooms and a tape-monitoring room were constructed at Burlington by adapting existing interviewing space at a cost of $18,800.00. The main construction costs involved the upgrading of acoustical qualities and providing furniture, a clock and a date record. The cost of all audio-visual equipment, cameras, playback facilities (at the station, Crown Attorney's office and courts), copying capability and a year's supply of tapes was $16,200.00 for a total capital expenditure of $35,000.00 on the project. This could probably be fairly described as a cost of about $7,000.00 per annum since the audio-visual technology will have a working life of at least five years and the interview rooms will remain in use without adjustment for considerably longer than that."

31. Supra footnote 29 at pp. 42-44.

32. Supra footnote 28.

33. Ibid.

34. Ibid.

35. Ibid.

36. Ibid.

37. Ibid.

38. A project to videotape impaired drivers by the Vancouver Police carried out in the late 1970's was viewed as being largely unsuccessful notwithstanding the earlier success of a similar project in Vernon, British Columbia.

39. There is no doubt that some form of video equipment is within the financial reach of virtually all police forces: "Most departments will not be able to afford the luxuries of these items, since their cost can run over $10,000.00. However, departments can produce good quality tapes with a single camera system." Joseph Missonelli, "Exploring the Television Frontier", in "Law and Order: An Independent Magazine for the Police Profession", Vol. 31, No. 5, May, 1983.

CHAPTER 4

THE USES OF VIDEO TECHNOLOGY BY POLICE - BRITISH COLUMBIA

"Electronic devices have come to stay. They have a clear place in our modern life in business and ordinary day to day existence."

R. A. Sargent in "The Sargent Report", 1967.

INTRODUCTION

It has been almost twenty years since Judge Sargent submitted his report (1), yet his comments are as true today as they were then. The majority of police forces operating in British Columbia use video equipment to a greater or lesser degree. In gathering this information, the Police Commission communicated with all police forces in British Columbia (2) and held meetings with the R.C.M.P., the Coordinated Law Enforcement Unit (C.L.E.U.), the Vancouver City Police and the Victoria City Police. From the material gathered, it is apparent that police in British Columbia have access to very sophisticated video equipment and are using it on an ever increasing basis.

R.C.M.P.

This province-wide force has extremely advanced video equipment available to its investigating teams. The predominate use of video equipment is in the context of surveillance and particularly, surreptitious surveillance. The R.C.M.P. regard video surveillance as a powerful instrument in the investigation of crime and videorecordings obtained in the course of investigations are handled with the same concerns for continuity and control that attend the interception of private communications.

To their credit, the R.C.M.P. have been careful to institute a series of internal controls governing their use of video equipment. In doing so, they have chosen the Part IV.1 provisions of the Criminal Code as a model. These controls vest authority with a senior officer and generally speaking, the more intrusive the surveillance, the higher in rank is the officer required to give authority.

It is not the purpose of this report to inquire into the particular methods employed by the R.C.M.P. in conducting surreptitious video surveillance. To do so could very well hamper ongoing and future investigations. Suffice it to say that the force does make extensive use of the video camera for surveillance purposes.

C.L.E.U.

Like the R.C.M.P., C.L.E.U. has video equipment that is near the forefront of available technology. The prevailing use of video equipment by this force is for surveillance purposes. For certain types of surveillance, C.L.E.U. prefers the video camera because of advantages it has over electromagnetic and acoustical devices such as "room bugs" which can be electronically detected. The video camera, once installed in a surreptitious manner (for instance, using a pinhole lens), is very difficult to detect electronically or otherwise.

VANCOUVER CITY POLICE

The Vancouver Police Department has three video cameras: one large unit for crowd control and overt group surveillance, one hand-held camera for general surveillance purposes and a third camera for training purposes.

The Vancouver Police have used the video camera

surreptitiously to videorecord criminal activity in progress (for example, shoplifting) and overtly, to film the arrest of suspects in situations involving large gatherings, such as the occupation of government offices, for the purpose of later demonstrating that no excessive force was used. The video camera has also been used by this police force to film crime scenes for the purpose of later refreshing the investigator's memory. In this respect, the camera is being used to create "electronic notes".

VICTORIA

The Victoria Police Department has a portable video camera which they have used to film demonstrations and crime scenes. They also use the video camera for training purposes and for surreptitious surveillance, including the filming of "street kids". The identification officer in charge of video use has taken a training course with the R.C.M.P., particularly with respect to the use of the video camera in filming crime scenes.

The Victoria Police regard the use of the video camera as being extremely helpful in building a "quality case".

MATSQUI

The Matsqui Police have had a portable video camera since 1980. Under the direction of Corporal Roy Booth (3), they regularly use the camera to film scenes of major crimes and have found the subsequent recordings to be very helpful in furthering investigations. They have on one occasion used the video camera to record an accused murderer's re-enactment of the crime (4) and have also considered other uses, including the filming of lineups with the intention of later showing the videorecording to

potential eyewitnesses. This was considered in a case where the victims, elderly women, were extremely fearful of seeing the accused in person. However, before the procedure was followed, the accused confessed and a lineup became unnecessary.

WEST VANCOUVER

This municipal police force has a video camera which it has used for crowd control, child sex cases and cellblock surveillance. The use for crowd control has centered around summertime drinking parties involving large groups of youths at West Vancouver beaches which have, from time to time, resulted in violence. As well, the gathering of a large number of Sikhs in protest at the Indian Ambassador's residence in the British Properties has been videorecorded by the police.

The West Vancouver Police routinely videotape all interviews of children making complaints of sexual abuse. These videorecordings have on occasion been subsequently shown to a suspect. On one such occasion, the impact of viewing a young victim relate a history of abuse resulted in the accused making a full confession.

NEW WESTMINSTER

This force has a video camera for crowd control which is also used to film scenes of major crimes. The New Westminster Police Department intends to expand its use of video equipment in the near future.

PORT MOODY

Port Moody Police use a closed circuit television solely for the purpose of cellblock surveillance, although

they have plans for expanded use. The department has requested funding to obtain further video equipment which they intend to use for traffic surveys and general surveillance.

DELTA

This force has one video camera and the only use to which it has been put to date has been to film crowd scenes.

IMPAIRED DRIVING INVESTIGATIONS

In the late 1970's, the Vancouver Police conducted an experiment based upon an earlier and successful project in Vernon, B.C. regarding videotaping of impaired drivers. The Vancouver project was conducted over a six month period with impaired drivers being filmed while performing sobriety tests. A room at the police station was designated for this purpose and the videotaping was carried out by a special team. There were initial expectations that accused persons so filmed would plead guilty largely because they would anticipate being embarrassed by observing themselves on television in the courtroom. Moreover, it was felt that such videorecording would yield evidence that was graphically demonstrative of impairment.

In each case, defence counsel was advised in advance of the existence of the videotape and urged to view the tape before trial.

After the experimental period, the program was discontinued and was regarded as having been unsuccessful. It was felt that the guilty pleas which resulted would have occurred in any event and that in marginal cases, defence counsel took the view that the videorecording did not

disclose obvious impairment. In cases involving severe impairment which was clearly demonstrated by the videotapes, the Crown was of the view that the evidence would have supported the allegation of impairment without the videotaped portion. (5)

The Vernon project, on the other hand, was a resounding success. Guilty pleas increased substantially as a result of the videorecordings. This was attributed to two factors:

(a) The police in Vernon embarked upon a very concentrated program against drinking and driving;

(b) The fact that Vernon was a smaller community probably resulted in accused persons being more intimidated by the prospect of having their actions shown on a television screen in open court.

SUMMARY

As has been shown, the majority of police forces in British Columbia have video equipment in one form or another. Moreover, it is important to point out that all municipal forces in the Province have access to either R.C.M.P. or C.L.E.U. video equipment, provided the forces agree to subject themselves to R.C.M.P. or C.L.E.U. internal guidelines regarding the use of such equipment. In cases of borrowed use, the municipal forces are provided with R.C.M.P. or C.L.E.U. expertise in setting up and operating the equipment. In order to obtain the use of such equipment, a senior police officer of the municipal force must make a request to a senior level R.C.M.P. officer or an Inspector of C.L.E.U. Once the request is approved, both equipment and expertise are loaned to the municipal force.

Footnotes

1. Report of the Royal Commission of Inquiry into Invasion of Privacy (Victoria, 1967), R. A. Sargent, Commissioner.

2. Apart from the various detachments of the R.C.M.P. operating in the Province of British Columbia and the Coordinated Law Enforcement Unit (C.L.E.U.), the following cities and municipalities also have their own police forces: Vancouver, West Vancouver, New Westminster, Delta, Port Moody, Matsqui, Nelson, Victoria, Oak Bay, Esquimalt, Saanich and Central Saanich.

3. Corporal Roy Booth has lectured on the subject of video use in police investigations in both Canada and the United States.

4. R. v. Simpson, unreported, B.C. Supreme Court, November 23, 1983, New Westminster.

5. J. C. Bellows of Regional Crown Counsel in Vancouver who had been involved with the Vancouver impaired driving project, provided this information to the Commission.

CHAPTER 5

LEGISLATION AND CONTROLS

"Where discretion exists, the two principle needs are 'the elimination of unnecessary discretionary power and better control of necessary discretionary power'. As Davis explains, the principle ways of controlling discretionary power are "confining", "structuring" and "checking".

Stanley A. Cohen, Invasion of Privacy, referring to Davis, Discretionary Justice: A Preliminary Inquiry".

INTRODUCTION

In spite of the fact that the video camera represents the most intrusive form of surveillance available to police today, there is no legislation in Canada governing its use. Indeed, there is no effective video surveillance legislation anywhere in the United States, the United Kingdom or Australia, notwithstanding that calls for such legislation have been heard in various jurisdictions for a decade. (1)

THE ABSENCE OF LEGISLATION

Canada

In Canada, the interception of private communications is governed by Part IV.1 ("Invasion of Privacy") of the Criminal Code. The legislative history of Part IV.1 has been well documented. (2) Interestingly, when this legislation was first introduced, it was entitled the Protection of Privacy Act. (3) The new title more appropriately reflects the intention of Parliament in enacting Part IV.1 as the Law Reform Commission of Canada has stated:

"The Supreme Court of Canada, in Goldman v. The

> **Queen** observed that it may be more realistic to say that the purpose or effect of Part IV.1 has been to regulate the method of breach of any such right." (4)

Although the provisions of Part IV.1 comprise a detailed legislative scheme governing police interception of private communications, this legislation has no effect on video surveillance. (5) The legislation is clearly directed at oral communications. (6) The seizure of visual images was never contemplated by the drafters.

It is anomalous that Canada should have in place extensive legislation in the area of audio interceptions but not in the area of the more intrusive surveillance techniques of the video camera. It is not, however, surprising. When Parliament was engaged in the study, research and drafting of Part IV.1 in the early 1970's, video technology was at a nascent stage and video surveillance was seldom employed by police forces. This situation has changed dramatically.

In Working Paper 47, the Law Reform Commission referred to video equipment under the inclusive name of "optical devices". With respect to these optical devices, the Law Reform Commission recognized "...the potential for serious privacy issues to arise in the area..." (7) However, the Law Reform Commission went on to say:

> "Without a great deal more research on the types of devices presently in use and their capabilities, we do not believe that it is possible to legislate in this area in a comprehensive way." (8)

The problem with this statement is that from all the Police Commission has learned the technology and use of video equipment for surveillance purposes has long since outstripped any form of legislation or control. Moreover, because of the intense studies and researching required before proposed legislation is implemented, there is always

a considerable time lag in the introduction of statutory controls. The history of Part IV.1 is an excellent example of this. For instance, the Sargent Report (9) was delivered on January 3, 1967 recommending federal legislation in the sphere of audio interceptions. Part IV.1 did not become law until June 30, 1974. The point is that the time is ripe. The time is now.

As will be seen, courts in the United States have imposed Constitutional standards for search and seizure in video surveillance cases and have found that certain Federal Court rules empower superior court judges to issue search warrants for video surveillance. (10) Indeed, U.S. courts have gone so far as to say that there is an inherent jurisdiction in a superior court judge to grant a warrant for video surveillance purposes. (11)

Search and seizure in Canada is governed by s. 443 of the Criminal Code and certain other federal statutes. (12) It is clear that s. 443, which permits a Justice of the Peace to grant a search warrant, could not be applied to video surveillance. Although it would appear that visual images can be searched and seized (13), the drafters of s. 443 did not intend the legislation to apply to the search or seizure of an intangible object. (14) Moreover, it would be unusual in the extreme if Parliament was to have intended that s. 443 of the Code should apply to video surveillance, thus permitting a Justice of the Peace to grant such a warrant, whereas a superior court judge is required to grant an authorization to intercept private communications. The clear conclusion is that s. 443 does not apply to video surveillance.

As for the argument that a superior court judge in Canada has an inherent or common law jurisdiction to grant a warrant for video surveillance, this is a matter for debate.

The Criminal Code of Canada came into force July 1st, 1893 and involved the codification of pre-Confederation statutes and common law. Although s. 7(2) of the Code retains the criminal law of England except as altered, varied, modified or affected by the Code, it is arguable that the common law jurisdiction to grant a search warrant respecting tangible objects did not survive the codification of 1893:

> "There is therefore no right to make such a search or to authorize it, unless there is a clear and unambiguous statutory provision. Such express authority can be found only in statutes, the expression of the will of Parliament." (15)

As for the search and seizure of intangible objects, at least one author has suggested that the approach taken by U.S. courts could apply in Canada, thus providing an interim method of authorizing a search warrant for video surveillance until legislation is passed. (16) The problem with this proposition is twofold: (1) The courts tend to be conservative in vesting themselves with powers that they have not traditionally exercised and (2) the concept of inherent jurisdiction is an elusive one and difficult to define. (17)

The notion of a superior court of criminal jurisdiction deciding that it has the inherent jurisdiction to grant a warrant for video surveillance is alluring given the absence of statutory controls. However, whether a superior court of criminal jurisdiction would vest itself with such authority is purely speculative.

The question now becomes whether there are any other means of legislation or control available to govern intrusive video surveillance. An imaginative person steeped in Constitutional theory might suggest that an invasion of an individual's s. 8 right to privacy could give rise to the remedy of an injunction under s. 24(1) but this

is not the type of strict control that is necessary. The only other statutes which have any bearing on this subject are the Privacy Acts of British Columbia, Saskatchewan, Manitoba and Newfoundland. (18) These statutes make it a tort, actionable without proof of damage, to violate the privacy of another. They all specify that privacy may be violated by eavesdropping or surveillance whether or not accomplished by trespass. (19) All four statutes contain exceptions excluding police officers from the tort provisions where the act or conduct complained of was in the course of duty and "...was neither disproportionate to the gravity of the crime or matter subject to investigation nor committed in the course of a trespass." (20) This wording is sufficiently broad that when coupled with the sections defining and outlining the degree of privacy to which a person is entitled, it becomes difficult to imagine a scenario where a police officer conducting surreptitious surveillance would be subject to sanction under any of these statutes. (21) In any event, the fact that the conduct of a police officer acting in the course of his duty might or might not be excluded from the provisions of these various provincial acts is of little import, particularly in British Columbia where, as history has shown, the statute has been little used.

U.S.A.

The United States in Title III has legislation similar to Part IV.1 of the Code governing the interception of private communications. (22) As with Part IV.1 of the Criminal Code, Title III does not apply to video surveillance but is limited to the interception of aural communications. (23) Given the burgeoning use of video equipment for intrusive surveillance by police, U.S. courts have responded by applying minimal Constitutional standards and Title III requirements to such surveillance. The foremost case in

this area is U.S. v. Torres where Posner, J. of the U.S. Court of Appeals Seventh Circuit upheld the validity of a warrant authorizing video surveillance pursuant to Federal Rules. (24) Posner, J. also found that a U.S. superior court judge had inherent jurisdiction to grant such a warrant apart from statutory authority. (25) Although the Torres case has been the subject of criticism, it is significant in that it forced the Court to come dangerously close to donning the hat of a legislator and was marked by Posner, J.'s plea for comprehensive legislation to control video surveillance. (26)

One U.S. statute that would appear to govern video surveillance is the Foreign Intelligence Surveillance Act of 1978 (FISA). (27) This statute, however, is limited to the electronic surveillance of foreign agents and other matters involving national security and therefore, has no application to domestic law enforcement. (28)

In the fall of 1985, The Hon. Robert W. Kastenmeier introduced a bill in the House of Representatives designed to govern the use of video surveillance by police forces. This bill died without further hearings and without Senate interest. The bill may be revived but to date, it has not resulted in any legislative enactments. (29) Accordingly, the United States, like Canada, remains without comprehensive legislation governing police use of video equipment.

Other Jurisdictions

England

In spite of the fact that at least one constabulary in England has been using video equipment for a variety

of purposes since 1973 (30), there is no legislation governing the use of such equipment. The Police and Criminal Evidence Act of 1984 has specific sections dealing with powers to stop and search and powers of entry, search and seizure, but has no bearing on video surveillance.

The Interception of Communications Act of 1985 relates to telecommunication systems but only in the public sphere. This statute makes it an offence to intercept "...a communication in the course of its transmission by post or by means of a public telecommunication system..." (31)

Australia

There are no laws controlling the use of optical devices in any part of Australia (32) notwithstanding that the Australian Law Reform Commission has "...identified the use of optical devices as a serious privacy problem". (33) In its discussion paper "Privacy and Intrusions", the Australian Law Reform Commission has recommended that "...the use of optical devices for surreptitious surveillance without proper authority of law should be an offence. Specific legislation should be devised to keep abreast of technological developments in surreptitious surveillance." (34) Interestingly, the Commission went on to state that a test based on a reasonable expectation of privacy should be employed to define circumstances in which the use of optical devices should be prohibited. Despite these recommendations made in 1980, no legislation has ensued.

CONTROLS

British Columbia: R.C.M.P.

In British Columbia, the R.C.M.P. have set up a system of internal controls and guidelines pertaining to the

use of video equipment in the investigation of crime. These controls which are modelled after the Part IV.1 provisions of the Criminal Code are aimed at vesting decision-making authority in a high ranking officer depending on the nature of use to which it is proposed to put the video equipment. The R.C.M.P. stress the need to couple these controls with adequate training and emphasize that the real controls rest in the judgment of individual officers. In short, good training begets good judgment. Members of the R.C.M.P. involved in video use take a training course which covers video technology and the use of video equipment and as well, review matters that should be considered in interpreting the current state of the law relating to videotape evidence.

It should be noted that these guidelines are in written form and subject to change. One notable provision is that the use of the video camera in investigating an offence under s. 195(1) (procuring) of the Criminal Code where such use would extend to the interior of a dwelling house, motel room or like place is prohibited. (These guidelines are discussed at greater length in Chapter 9 of this report.)

Other Police Forces in British Columbia

The Vancouver City Police have no existing written policy or guidelines regarding the use of video equipment although requests to use such equipment are scrutinized by a senior officer. A similar situation exists with the Victoria City Police where either the Chief Constable or a Superintendent must approve all use of video equipment. The Victoria Police are presently in the process of establishing policy and procedure which will be in written form and will include controls over the use of video equipment.

The police in West Vancouver and Matsqui also

require that requests for the use of video equipment be authorized by a senior officer.

Police Forces Elsewhere in Canada

Edmonton

As has been shown, the Edmonton Police Department has a wide range of uses for video equipment. With respect to the videotaping of crime scenes and re-enactments, members who are familiar with the functions and operation of video equipment (Homicide Unit "Recordists"), are the only persons authorized to use the equipment.

In the case of surveillance, the Technical Support Unit within the Criminal Investigation Division carries out this function. The Staff Sergeant in charge of the unit is responsible for evaluting and approving requests from investigators for such use of video equipment.

Toronto

This police force has detailed written guidelines respecting the use of video surveillance. These guidelines set out precisely the information required before video or photographic surveillance can be employed in an investigation. A report from a member must be typewritten and include such factors as a synopsis of the suspected criminal activity and details of the proposed subject of surveillance. The report also requires an indication as to whether the proposed surveillance is to be used in conjunction with an authorization to intercept private communications, the specific location and type of premises where videotaping equipment is to be installed and the names, badge numbers and telephone numbers of police officers who are available for backup during the surveillance. The report is submitted

to the Unit Commander for approval. In reviewing the request, the Unit Commander considers whether the surveillance is warranted and whether sufficient personnel are available to assist. If the Unit Commander approves the request, he will sign the report and forward it to the Unit Commander of Intelligence Services. This person, in turn, is required to review the report and may then authorize the surveillance ensuring that a proper liaison is maintained during the duration of the surveillance.

The police officer in charge of the surveillance is to ensure the continuity and security of all tapes. Both the Unit and District Commanders must ensure the security of all copies of reports regarding video surveillance by their units. The Unit Commander of Intelligence Services oversees the security of all master videotapes and related documents.

Where video equipment is used to record and monitor a prisoner's behaviour, the prisoner is advised immediately upon entering the police building that surveillance equipment is in use. The Unit Commander ensures the security of the videotapes which are retained for two years or until the completion of the appeal period for any court case in which the tape is used. A video cassette control log is kept which includes such information as the name of the suspect, the date and operator's number and initials. Tapes obtained in this fashion are viewed only at the discretion of the Unit Commander.

On February 11, 1985, this police force commenced a two year pilot project involving the use of video equipment to record statements from suspects. Written policy outlines the procedures which must be followed in the course of such video use. (35)

Ontario Provincial Police

This provincial force, like the R.C.M.P., places great emphasis on the importance of training in the use of video equipment. Video surveillance tasks are carried out by the Photographic Surveillance Unit of the Technical Support Branch and officers in this unit receive on-the-job training but must also successfully complete a video surveillance course at the Ontario Police College. This course places emphasis on the law of video surveillance and is taught by Crown Counsel. The course also teaches the mechanical aspects of handling video equipment.

In the decision-making process as to whether or not to employ video surveillance, a number of questions must be asked before approval is given. These are as follows:

1. Would the installation violate the Charter of Rights?
2. Would the installation be contrary to case law or previous decisions of the courts?
3. Would the installation be illegal under the Criminal Code?
4. If s. 178.1 of the Criminal Code applied to optical devices, would a judge authorize the use of the equipment in the particular case?

As for continuity of the videotape itself, this is treated in the same manner as an audio tape with the master tape being sealed and filed for court.

This information was supplied to the Police Commission by R. Archie Ferguson, Commissioner of the Ontario Provincial Police. In a letter to the B.C. Police Commission, Mr. Ferguson has made the following perceptive observation:

"I believe that in the best interest of the public,

> the judicial system and the police, the use of video equipment and optical devices should be included in Part IV.1 **Criminal Code**. This would allow for the legal use of this equipment, control the non-authorized use of equipment and bring the 'privacy legislation' in line with the 1980's."

Other Police Forces in Ontario

The Niagara Regional Police Force uses video equipment during the course of criminal investigations but does not have a written policy. Video equipment is only utilized where other conventional means of investigation have proven insufficient. The Niagara Regional Police regard the use of video as a valuable investigative aid. In a letter to the Police Commission, James A. Gayder, Chief of Police for the Niagara Regional Police, stated:

> "Although at present the use of video equipment is not governed by either federal or provincial legislation, I would not be opposed to some form of regulatory control. Had these controls existed, this force may well have avoided the adverse criticism by sectors of the public, condemning the use of video surveillance in our past investigation of homosexual activity in public washrooms."

The Ottawa Police Force at the present time does not have policies or guidelines regarding the use of video surveillance. If such tactics are resorted to in the course of an investigation, Crown Counsel would be consulted. (36)

Ontario Police Commission Guidelines

On June 3, 1986, the Ontario Police Commission released guidelines regarding video surveillance of public washrooms to apprehend sexual offenders. These guidelines are as follows:

1. The police should only enter this type of investigation after receiving a valid complaint.

2. If the complaint has only been received as a verbal expression it should be fully documented in writing and the name of the original complainant recorded.

3. Physical surveillance should be conducted to confirm reasonable and probable grounds.

4. All enforcement strategies should be considered and video surveillance should only be undertaken when there are no other practical options available.

5. The decision respecting the use of video surveillance should always include
   - the nature of the crime in question
   - the danger to members of the public or the police
   - the potential for damage to force integrity.

6. That police officers will not use video surveillance equipment for this purpose before the Chief or his designee at a senior rank reviews the circumstances and issues his written permission.

7. That whenever this equipment is used for this purpose, the Chief or his designee issues instructions that there will be no indiscriminate viewing of washroom users.

8. That whenever possible, any camera focused on the interior of a washroom cubicle should not be activated until the operator of the equipment has developed reasonable and probable grounds by viewing the common area of the washroom that a criminal act is taking place in the cubicle in question.

9. Installations of this type should only remain in place for the minimum period required to satisfactorily address the complaint.

In its memorandum, the Ontario Police Commission acknowledged that certain police forces had declined to use video surveillance in washroom cases, instead adopting a proactive role in an effort to disuade potential offenders. Such procedures involved:

1. Recommendations to private concerns to

increase their uniformed security patrols of washrooms.

2. The posting by private concerns of signs advising potential offenders that the premises are patrolled by security staff and illegal activities will not be tolerated.

3. Encouraging private concerns to issue notices barring potential offenders under the provision of the Trespass to Property Act and follow up enforcement by the police of those ignoring the notices.

4. Application of Section 175(1)(e) of the Criminal Code in applicable circumstances.

5. Where manpower is available, visits by uniform police officers.

It is interesting to note that the Ontario Police Commission made the following statement after considering the aforementioned procedures:

> "Although none of these initiatives may be very effective by themselves, a combination of all applied in a concerted and consistent fashion may have the desired effect. If not, the efforts made to first address the matter in this manner, prior to resorting to a technology with the potential to offend the rights of innocent washroom users, would go a long way in justifying the use of this equipment as a last resort."

The Ontario Police Commission has also commenced a wide-scale review of video surveillance with the intention of bringing forward suggested guidelines for all video surveillance applications. (37)

U.S.A.

Federal Bureau of Investigation

The Federal Bureau of Investigation which uses video equipment to a great extent, has written operational

guidelines regarding such use in criminal investigations. These guidelines include a general restriction:

> "These guidelines shall protect constitutional rights and personal privacy and shall ensure that investigations are conducted with minimal intrusion consistent with the need to collect information or evidence in a timely and effective manner. (38)

The guidelines further state that in collecting information regarding civil disorders and public demonstrations requiring federal assistance, the Attorney General shall issue guidelines designed to ensure that investigative techniques shall not include video surveillance except in exigent circumstances and with the approval of the Attorney General. They also state that investigative techniques used for the collection of information relating to a peaceful public demonstration shall not include video surveillance.

Drug Enforcement Administration

If an undercover agent or cooperating individual is meeting with the subjects of an investigation, no court authority is needed to either record the conversation or videotape the meeting. However, in the absence of such circumstances, the police must seek a court order to videotape a meeting if it is to be held at a location where the participants have an expectation of privacy. If the federal agent seeks to intercept private communications, he must first obtain the authority of the Department of Justice and then a court order pursuant to Title III. (39)

SUMMARY

The quotation beginning this chapter involved a reference by Stanley Cohen to K. C. Davis' book "Discretionary Justice". (40) The full text of Davis' remarks on the

importance of confining discretionary power is worth repeating:

> "If...the problem about discretion at all governmental levels...is almost entirely that of excessive discretionary power and is seldom that of inadequate discretionary power, the two principal needs are the elimination of unnecessary discretionary power and better control of necessary discretionary power. The principal ways of controlling are structuring and checking. Structuring includes plans, policy statements, and rules, as well as open findings, open rules, and open precedent... Checking includes both administrative and judicial supervision and review. Our present concern is with eliminating and limiting discretionary power, that is, confining discretion. By confining is meant fixing the boundaries and keeping discretion within them. The ideal, of course, is to put all necessary discretionary power within the boundaries, to put all unnecessary such power outside the boundaries, and to draw clean lines. The ideal is seldom realized, and many of the failures are rather miserable ones, for they frequently result in avoidable injustice." (41)

Although in that passage Davis was referring to discretionary power in the United States, the same comments hold true in Canada. Certainly it can be said that where the matter of intrusive video surveillance is concerned, the absence of legislation has resulted in a situation where the police forces in this country have the broadest discretion to exercise, a discretion that is virtually without restraint. Although the response of some police forces has been to introduce their own policies and guidelines, other forces resort to the use of this advanced technology without such controls or internal directions.

Even in the case of those forces with internal guidelines, the discretion is far too broad. The discretion of the police must be confined. The police cannot be expected to restrict their own discretion. As Davis has stated:

> "Can the police be expected to act voluntarily in cutting down their own discretionary power through rule-making? The answer may be sometimes yes but usually no." (42)

Of necessity then, external sanctions must be imposed and these must come in the form of legislation. Legislation brings direction. Sound legislation brings certainty.

Footnotes

1. Nancy J. Montroy, "Recent Developments in Public Law: United States v. Torres: The Need for Statutory Regulation of Video Surveillance", 1985, Vol. 12, Journal of Legislation, 264; The Law Reform Commission of Canada, "Working Paper 47: Electronic Surveillance", 1986.

2. See generally Stanley Cohen, Invasion of Privacy: Police and Electronic Surveillance in Canada, 1983, Carswell; David Watt, Law of Electronic Surveillance in Canada, 1979 Carswell; Law Reform Commission of Canada "Working Paper 47" supra footnote 1.

3. 1973-74 c. 50.

4. Law Reform Commission of Canada, supra footnote 1 at p. 7.

5. R. v. Biasi et al (No. 3) (1982) 66 C.C.C. (2d) 566.

6. S. 178.1 of the Criminal Code defines "private communication" as "any aural communication or any telecommunication made under circumstances in which it is reasonable for the originator thereof to expect that it will not be intercepted by any person other than the person intended by the originator thereof to receive it."

7. Law Reform Commission of Canada, supra footnote 1 at p. 21.

8. Ibid at p. 22.

9. Report of the Royal Commission of Inquiry into Invasion of Privacy (Victoria, 1967), R.A. Sargent, Commissioner.

10. For instance, U.S. v. Torres 751 F. (2d) 875 (1984) and People v. Teicher 422 N.E. (2d) 506 (1982).

11. U.S. v. Torres, supra.

12. For example, the Combines Investigation Act, R.S.C. 1970, c. C-23, s. 10 and the Income Tax Act, R.S.C. 1952, c. 148, s. 231. Ss. 10(1) and 10(3) of the Combines Investigation Act were held to be unconstitutional in the case of Hunter v. Southam [1984] S.C.R. 145 and have subsequently

been replaced by legislation on September 19, 1986: the Competition Act, s. 9. A series of cases challenging the constitutionality of the search and seizure provisions of the Income Tax Act have also resulted in amendments to that statute: see particularly s. 231.3. Cases declaring the former search and seizure provisions of the Income Tax Act to be unconstitutional include Lewis v. MNR et al [1984] C.T.C. 642 (F.C.T.D.); MNR v. Kruger Inc. et al [1984] C.T.C. 506 (F.C.A.) and Vespoli et al v. The Queen et al [1984] C.T.C. 519 (F.C.A.).

13. R. v. Lofthouse, unreported, Reasons for Judgment of McNeely, J., Ontario District Court, March, 1986 and R. v. Wong et al, unreported decision of Paris, J., Provincial Court of Ontario, September 15, 1985.

14. See for instance, Re Banque Royale du Canada and The Queen (1985) 18 C.C.C. (3d) 98 at p. 100 and Re Copeland and Adamson et al (1972) 7 C.C.C. (2d) 393 at p. 400, where Grant, J., referring to s. 443, stated:

> "The words of such section, however, relate to tangible property..."

Re Copeland stands for the proposition that a search warrant could not be obtained to conduct audio surveillance. A similar result occurred in Re: Bell Telephone Company of Canada, (1947), 89 C.C.C. 196.

Moreover, although s. 433(1)(b) refers to "...anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence...", it would not seem possible to have an anticipatory search warrant because the section is framed in the present (s. 443(1) reads in part, "...reasonable ground to believe that there is in a building, receptacle or place..."). (underlining added)

15. James A. Fontana, The Law of Search and Seizure in Canada, 2nd ed., 1984, Butterworths at p. 3; see also, Winston McCalla, Search and Seizure in Canada, (1984), Canada Law Book.

The opposite argument is that superior courts of criminal jurisdiction have inherent power in relation to search warrants for the purpose of the search and seizure of tangible objects. See for instance, Descoteaux v. Mierzwinsky (1983) 70

C.C.C. (2d) 385 (S.C.C.).

16. Ken Chasse, "Video Surveillance - SVS and the Slippery Slope" in "Crown's Newsletter", November 30th, 1985, Vol. 5, p. 31. Mr. Chasse actually argues not that there is an inherent jurisdiction in a superior court of criminal jurisdiction to grant a search warrant for video surveillance but, rather, that such a power may well exist in the Charter:

> "Therefore, SVS (Surreptitious Video Surveillance) is a good example of why the Charter must be recognized as giving rise to a judicial power to authorize search and seizure."

at p. 41 and subsequently at p. 43:

> "...a preferable course, in the absence of a Criminal Code power, is that the Charter should be recognized as containing an inherent power to authorize video surveillance and to allow regulation by means of a detailed authorization."

17. Black's Law Dictionary, 4th ed., defines the words "inherent powers of a court" as "those reasonably necessary for administration of justice".

18. Privacy Act R.S.B.C. 1979, c. 336; Privacy Act R.S.S. 1973-73, c. P-24; Privacy Act S.M. 1970 c. 74; Privacy Act (Nfld.) 1981, c. 6. The British Columbia legislation was in partial response to the Sargent Report, supra footnote 9.

19. Although the British Columbia statute only refers to eavesdropping or surveillance, the other provincial acts specify the surveillance as being either auditory or visual. The Manitoba statute is unique in that in s. 7, it mandates the exclusion of evidence in a civil proceeding where that evidence was obtained "by virtue of or in consequence of a violation of privacy in respect of which an action may be brought under this Act..."

20. B.C. s. 2(d); Sask. s. 4(i); Man. s. 5(e); Nfld. s. 5(d).

21. The wording of these statutes in defining and outlining the privacy interests sought to be protected is very similar. The B.C. statute states as follows:

"s.1(2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, due regard being given to the lawful interests of others.

(3) In determining whether the act or conduct of a person is a violation of another's privacy, regard shall be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties."

It is clear that the qualifying clause in s. 1(2) "...due regard being given to the lawful interests of others" and the content of s. 1(3) have the effect of greatly whittling down the nature and degree of privacy to which a person is entitled under this statute.

22. Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C.A., ss. 2510-2520; See also, Watt, supra footnote 2 at p. 371 (App. "B") for a review of the legislative history of Title III.

23. U.S. v. Torres, supra footnote 10 at p. 880.

24. Ibid at p. 877-880, where Posner, J. held that Rule 41 of the Federal Rules of Criminal Procedure was applicable to video surveillance.

25. Ibid at p. 879.

26. Ibid at pp. 885-886.

27. Pub. L. 95-511, 92 Stat. 1783, codified primarily as c. 36 of 50 U.S.C.

28. See in particular, the comments of Posner, J. in U.S. V. Torres, supra footnote 10 at p. 881.

29. 99th Congress, 1st Session, H.R. 3455; "Congressional Record - Extensions of Remarks", September 30, 1985, E4269-E4270.

30. H. V. D. Hugh Hallett and Michael Lofthouse, "Television in the Garden of England", in "The Police Chief", November, 1981, p. 47.

31. C. 56, s. 1 (U.K.).

32. Australian Law Reform Commission, "Privacy and

Intrusion; Discussion Paper No. 13" at p. 48.

33. Law Reform Commission of Canada, supra footnote 1 at p. 21.

34. Supra footnote 32 at p. 4.

35. This information was supplied by R. P. Lynn, Acting Deputy Chief of Police, Support Services Metropolitan Toronto.

36. This information was supplied by the Ottawa Police Force Deputy Chief of Police on behalf of Arthur R. Rice, Chief of Police.

37. Ontario Police Commission Guidelines Memorandum, June 3rd, 1986; Criminal Intelligence Service of Ontario Draft Guidelines Regarding Covert Video Use of Optical Devices, October 9, 1986.

38. Excerpt from the International Association of Chiefs of Police Manual on Intelligence.

39. This information was supplied to the Police Commission by Francis J. Diskin, Associate U.S. Attorney; U.S. Department of Justice, Western District of Washington, Seattle, Washington.

40. Stanley Cohen, supra footnote 2 at p. 37.

41. Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry, 1969, Louisianna State University Press at pp. 54-55.

42. Ibid, p. 94.

CHAPTER 6

THE ADMISSIBILITY OF VIDEORECORDED EVIDENCE

"With the scientific development of motion pictures, there might arise, in the future, an action when the pictures themselves, properly proved, would be the very best evidence of what occurred."

> Farris, C.J.S.C. in Army and Navy Department Store v. Retail, Wholesale and Department Store Union, etc. (1950) 97 C.C.C. 258.

INTRODUCTION

Farris, C.J.S.C's decision in the Army and Navy Department Store case (1) came at a time when the courts held to the rigid view that photographs were only admissible to illustrate or elaborate oral testimony. Notwithstanding its potential for accuracy, photographic evidence was not admissible in and of itself as proof of the matters depicted. Farris, C.J.S.C. apparently recognized the potential for change:

> "...with modern inventions, old rules should not necessarily remain static". (2)

In spite of this judical prescience, it would be many years before Canadian courts would admit photographic evidence as demonstrative evidence; as proof of the matters depicted and not simply illustrative of a witness' testimony. (3)

PHOTOGRAPHIC EVIDENCE: ILLUSTRATIVE v. DEMONSTRATIVE

Not long after its invention, the camera's potential for accuracy was recognized by the courts:

> "We cannot conceive of a more impartial and truthful witness than the sun, as its light stamps

> and seals the similitude of the wound on a photograph put before the jury; it would be more accurate than the memory of witnesses, and as the object of all evidence is to show the truth, why should not this dumb witness show it?" (4)

If photographic evidence was thought to be "impartial and truthful", why were the courts reluctant to admit it as demonstrative evidence, independent of oral testimony and proof of the matters depicted? The answer appears to lie in an inherent judicial distrust of the accuracy of the camera coupled with strict adherence to the basic tenets of the adversarial system and particularly, cross-examination. If a photograph was admitted as illustrative of a witness' testimony but not as independent proof of the matters, the witness could be cross-examined as to what he had observed and it was the witness' recollection that was paramount. The same situation would not apply where the photograph was admitted as independent proof of the matters depicted.

The traditional view then was that photographs were simply illustrative of oral testimony:

> "A photograph...is simply nothing except so far as it has a human being's credit to support it...as a preliminary foundation for the admission of photographs, they must be 'verified' by a testimonial sponsor as correctly expressing his observation and recollection of the data in question. In addition, it must be relevant and assist a witness in explaining his testimony so that a jury may better understand the case." (5)

The problem with the Illustrative Rule was that it contained an inherent flaw. It placed human memory as a more accurate record of past events than the camera:

> "If a defective eye with a damaged optic nerve conveys an impression (gathered in twilight or under other deceptive visual conditions) to a diseased brain even after the eroding effects of weeks have advanced the process of forgetting, the

> owner of the eye - though he may be a simple soul of limited intelligence and even more limited vocabulary - will be permitted to describe in court what he thinks that he remembers that he saw; but, if a camera with cold precision and absolute fidelity records the view permanently and with minute accuracy, that view is kept from the jury perhaps...or its use is sharply circumscribed (under the illustration rule). Such strange logic has a baffling, Alice-in-Wonderland quality far removed from the realistic directness of the man-on-the-street. Perhaps only the logic of the law, wrought from centuries of philosophic inbreeding and tortured at times by the real and apparent need of stretching or confining the implications of precedent, could arrive at such a result." (6)

With the gradual acceptance of the common sense principle that an undistorted photograph depicts a scene as it existed, the Illustrative Rule was eroded and a new evidentiary basis for the admission of photographs arose. No less an authority than Wigmore recognized this change in 1970:

> "(The Illustrative Rule) was advanced in prior editions of this work as the only theoretical base which could justify the receipt of photographs in evidence. With later advancements in the art of photography, however, and with increasing awareness of the manifold evidentiary uses of the products of the art, it has become clear that an additional theory of admissibility of photographs is entitled to recognition...
>
> Given an adequate foundation assuring the accuracy of the process producing it, the photographs should then be received as a so-called silent witness or as a witness which 'speaks for itself'." (7)

THE ADMISSIBILITY OF PHOTOGRAPHIC EVIDENCE: "THE SILENT WITNESS"

Canadian courts, like English courts, have traditionally been reluctant to break new ground, particularly in the area of the admissibility of evidence. To state this is simply to reflect on the custom of precedent. The evolution

of the law is a careful and gradual process (8), yet there has always existed one expedient for accelerating this process - a case involving unusual facts.

In R. v. Davis (9), the accused was charged with gross indecency. Photographs of indecent acts involving the accused and another person had apparently been taken by a sixteen year old girl who was under the influence of LSD at the time. At trial, the girl was called as a witness for the Crown but her evidence was unsatisfactory in that she was unable to recall whether she had taken the photographs or as to what had occurred. The Alberta Court of Appeal nevertheless found the photographs to be admissible. Although the general rule was that the admissibility of photographs depended on their verification on oath by a person capable of doing so, this rule did not apply to a situation where the photographs had been found in the possession of the accused. Photographs found in such circumstances could be tendered in evidence by the persons who found them in the accused's possession and were thus prima facie admissible. In short, the photographs spoke for themselves. A precedent had been set.

THE ADMISSIBILITY OF VIDEORECORDED EVIDENCE

It is only fitting that one of the first cases in Canada involving the introduction of videotaped evidence arose out of a hockey game, Canada's national pastime. In R. v. Maloney (No. 2) (10), the accused was charged with assault causing bodily harm. The Crown sought to introduce videotaped evidence at trial. In admitting the evidence, LeSage, Co. Ct. J. recited the principles outlined in the earlier case of R. v. Creemer and Cormier (11) which had relied heavily on American authorities:

> "Throughout the American cases, one finds descriptive statements about the film, photograph

> or videotape material sought to be admitted into evidence such as, 'they accurately portray the subject', 'it is a true reproduction', 'fairly and accurately represents', 'truly and accurately depicted the events', 'truly and accurately represents', and 'clearly and accurately portray'.
>
> In the case of **Hendricks v. Swenson** (1972), 456 F. (2d) 503, Senior District Judge Van Pelt, in commenting on the use of a videotape recorded statement given by the accused, states at page 506: 'If a proper foundation is laid for the admission of a videotape by showing that it truly and correctly depicted the events and persons shown and that it accurately reproduced the defendant's confession, we feel that it is an advancement in the field of criminal procedure...we...emphasize the importance of a trial truly presenting the facts as they exist'.
>
> The recurrent theme throughout the cases is that for a proper foundation for admissibility of videotape material, it must be established that it is a true and accurate reproduction." (12)

The above passage reflects the obvious - that videotaped evidence is admissible on the same basis as photographic evidence. (13) Photographs are admissible provided that they are relevant, accurate, absent of any intention to mislead and verified on oath by a person able to speak to their accuracy and fairness. (14) As well, the photograph must comply with the usual requirement that applies to all evidence, that its probative value outweighs its prejudical effect. (15)

If introduced as demonstrative evidence, the videotape must be authenticated which can be done by (a) the video camera operator, (b) a person present when the videotape was recorded, (c) a person qualified to state that the representation is accurate or (d) an expert witness who can testify as to the operation of the equipment. (16)

Recent cases have demonstrated the admissibility of evidence recorded by the unmanned video camera. In R. v. Taylor (17), defence counsel objected to the admissibility

of videorecorded evidence on the basis that without a cameraman who could testify that the scenes depicted on the videotapes truly and accurately represented the reality of what occurred without distortion, the veracity of the tapes was so tenuous that it would be improper to admit them. During the course of argument, the Court set out five questions which it regarded as safeguards to the admissibility of videorecorded evidence:

(1) has the integrity of the tape or film been adequately established;

(2) has the operation of the camera been adequately examined;

(3) has the identification of the person and place depicted been adequately established;

(4) has the date and time of the scene depicted been adequately established; and

(5) does the course of conduct depicted fairly represent, without distortion, what an alert person might have observed if present. (18)

In ruling the videorecorded evidence admissible at trial, the Court stated:

> "The defence conceded the integrity of the videotapes; an expert witness testified as to how the video camera is activated and the manner in which it records; the location of the scene is an employee area in a public library; the identification of the person depicted is conceded to be the accused; and it has been established that the time and date of the incident depicted were imprinted on the film by a date-time generator." (19)

VIDEORECORDED EVIDENCE AND THE CHARTER

The impact of Charter protections on video surveillance has been recently tested in two cases in Ontario. Both these cases, R. v. Lofthouse and R. v. Wong, (20) have applied s. 8 of the Charter (the right to be

secure against unreasonable search or seizure) to surreptitious video surveillance by holding that video surveillance constitutes a search within the meaning of s. 8.

In Lofthouse, McNeely, J. followed the lead taken by the Ontario Court of Appeal in R. v. Finlay and Grellette (21) where it was held that private communications were protected by s. 8 of the Charter. McNeely, J. felt that it was only a short leap of logic to apply the same reasoning to video surveillance:

> "While it would no doubt be possible to distinguish the electronic capture of communications from the capture of visual images, it is difficult to see why for the purposes of s. 8 any distinction should be made. Once the premise is accepted that the purpose of s. 8 is to protect the reasonable expectation of privacy and this ascribed purpose should control the meaning of the words used in the section it would seem to verge on quibbling to treat visual interceptions and recording of activities on a basis different from interceptions of oral communications." (22)

Lofthouse involved the videorecording of acts of gross indecency in the cubicles of a public washroom. The police had failed to obtain sufficient evidence using conventional methods of investigation and proceeded to install three hidden video cameras in the washroom area. McNeely, J. held that this amounted to a violation of the accused's s. 8 right to privacy but declined to apply s. 24(2) of the Charter to exclude the evidence on the basis of the following factors:

(1) The police had reasonable and probable grounds to believe that the public washroom was being used on a regular and frequent basis for acts of gross indecency;

(2) The use of a video camera was the only means reasonably available for obtaining evidence of the offences being committed;

(3) The police had a sincere and legitimate concern for the fact that the extensive use of the washroom for acts of gross indecency was taking place in a public park regularly frequented by children;

(4) The decision to install video surveillance was not made quickly or lightly;

(5) The video cameras operated on only two days, resulting in eighteen charges, of which almost all accused were convicted;

(6) While all persons entering the washroom appeared on the monitor, the actual recording of images was done only of persons committing offences. (23)

In conclusion, McNeely, J. emphasized that the police had a reasonable belief that no machinery existed to obtain judicial authorization of a search by videotape:

> "That the search in question failed to meet the constitutional standard of reasonableness required by s. 8 was not the fault of the police so much as the lack of either a legislative scheme or authorizations similar to the wiretap provisions of the Criminal Code or a clearly enunciated judicially imposed standard." (24)

In R. v. Wong, the police were seeking evidence to establish a charge of keeping a common betting house and installed a hidden video camera to observe the accused's activities in a hotel room. Paris, J. of the Ontario Provincial Court applied the ruling in Hunter v. Southam (25) and held that the filming of an individual's activities constituted a search and seizure notwithstanding that no physical trespass occurred. The Judge also felt that the police could have obtained a search warrant and the failure to do so violated the precondition to a valid search as set out in Hunter v. Southam. (26) He accordingly excluded the evidence with the following comments:

> "Having concluded that s. 8 of the Charter protects the right to privacy, the unauthorized video surveillance in the circumstances described becomes of necessity a flagrant violation of this

> right. Everyone, I am sure would cringe at the thought that they could be filmed, in their home or a hotel room without the protection of a prior authorization.
>
> For these reasons, I rule the tapes inadmissible and the officers may not give evidence of what they saw on the monitors during the surveillance." (27)

SUMMARY

As has been shown, videorecorded evidence is admissible on the same basis as photographic evidence subject to authentication. The gradual acceptance by the courts of the demonstrative rule of photographic admissibility has created a situation where material recorded by the automatic or unmanned video camera is admissible. The only matters left unresolved are those which will invariably arise where Charter protections are invoked in opposition to the admissibility of the evidence. (28)

Footnotes

1. Army and Navy Department Store v. Retail, Wholesale and Department Store Union, etc. (1950) 97 C.C.C. 258.

2. Ibid at p. 261.

3. R. v. Davis (1970) 3 C.C.C. 260.

4. Franklin v. State (1882), 69 Ga. 36 at 43 (Ga. Sup. Ct.); For an excellent article on the topic of photographic evidence and particularly, the advent of the demonstrative rule and the admissibility of photographic evidence, see B. A. MacFarlane, "Photographic Evidence: Its Probative Value at Trial and the Judicial Discretion to Exclude it from Evidence", (1973-4) 16 Crim.L.Q. 149, especially at pp. 15-161.

5. N. E. Shaffer, "The Use of Post Photographs of Movable Objects or Persons at the Time of an Accident", (1958) 47 Kentucky L.J. 117; MacFarlane, op. cit. footnote 4 at pp. 151-152.

6. D. S. Gardiner, "The Camera Goes to Court", (1946) 24 N.C.L.R. 235; MacFarlane, op. cit. footnote 4 at p. 154.

7. Wigmore on Evidence (1970) Chadbourne Rev., Vol. III, s. 790; MacFarlane, op. cit. footnote 4 at p. 160.

8. The adherence to judicial precedent was clearly stated by Blackstone:

> "For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waiver with every new judge's opinion..."

from William Blackstone, Commentaries on the Laws of England, The University of Chicago Press, 1979, Vol. 1, p. 69.

9. Supra footnote 3.

10. R. v. Maloney (No, 2) (1976) 29 C.C.C. (2d) 431; See also another hockey-assault case where videotape evidence was introduced, R. v. Williams (1977) 35 C.C.C. (2d) 103.

11. R. v. Creemer and Cormier (1968) 1 C.C.C. 14.

12. R. v. Maloney, supra footnote 10 at pp. 433-434.

13. This is certainly the view of the leading authority on the admissibility of videotape and photographic evidence, Elliott Goldstein, who has written numerous papers on the topic and is the author of Goldstein on Videotape and Photographic Evidence, Western Legal Publications, Vancouver, B.C., 1986.

A similar view was taken by the Federal/Provincial Task Force on Uniform Rules of Evidence, 1982:

> "The Task Force concludes that no special evidence rules are required to deal with the reception of videotape evidence at this time. While video technology is technically different than cinematography, the evidentiary rules that have been developed in relation to the latter seem to apply to the former as well."

at p. 410.

14. Supra footnote 11 at p. 22.

15. Draper v. Jacklyn [1970] S.C.R. 92; Also see Elliott Goldstein, "Using Videotape to Present Evidence in Criminal Proceedings" (1985) 27 Crim.L.Q. 369, particularly at p. 371.

16. Goldstein, supra footnote 15 at p. 371; See also Daniel A. Bellemare, avocat, "Droit pénal: Ecoute électronique", in Revue du Barreau, Tome 41, Numéro 5, November/December, 1981 at pp. 1110-1111, where in the footnote, the author has stated:

> "(1) Me John D. Scott en 1978, dans un article non publié intitulé 'Motion Pictures and Video-tape Evidence', énumere les principales conditions d'admissibilité applicables aux photographies et aux films d'animation (pp. 4-5):
> 'Thus, beyond the minimum foundation of establishing the identity (the time and the place it was taken) of the subject matter and the accuracy of the representation, other elements may be necessary in some cases, and at least helpful in others. Some of the more important elements are as follows:

1. Qualifications and experience of the photographer;
2. Type, mechanics and quality of the photographic equipment and film used;
3. Placement of the camera when picture was taken, (location, height, direction of camera and distance from the object);
4. Weather and lighting conditions;
5. Length of sequence (in case of motion picture);
6. Explanation of any distorsion of heights, distances, illumination, relationship, etc. due to photographic process;
7. Manner of developing and printing the film;
8. Explanation of any changes or distorsion resulting from processing or editing the final print (splicing, etc. in the case of motion pictures);
9. Continuous custody of the film;
10. Conditions of the exhibition of the picture (if projected on a screen, through a viewer or motion picture);
11. Explanation of the speed at which the film is projected to ensure that the picture is not distorted by accelerating or retarding the projection; (Army and Navy Department Store (Western) Ltd. c. Retail Wholesale and Department Store Union, Local No. 535 et al, (1950) 97 C.C.C. 258 a p. 261 (B.C. Sup. Ct.);
12. Explanation of any variance in the scene as pictured in the film and the scene as it was at the time in question.": Paradis, The celluloid witness, (1965) 37 U. of Col. Law Rev. 235, at pp. 263-268."

17. R. v. Kathleen Mary Taylor (unreported reasons for judgment, June 8, 1983, Ont. Prov. Ct., Dodds, P.C.J.); The case is also summarized in (1983) 10 W.C.B. 303 and in Goldstein on Videotape and Photographic Evidence, supra footnote 13 at p. 12-98.

18. Supra footnote 17; Unreported reasons at p. 8; Goldstein summary at p. 12-99.

19. Supra footnote 17; Unreported reasons at p. 11; The Taylor case is similar to its American namesake, U.S. v. Taylor (1976) 530 F. (2d) 639, a robbery case in which a surveillance camera was activated after all bank personnel were locked in the bank vault. At trial, a government witness, not present during the robbery, testified as to

the manner in which the film was loaded, how the camera was activated, who removed the film and the chain of possession thereafter. It was held that the testimony furnished was sufficient authentication for the admission of photographs into evidence.

20. R. v. Lofthouse (unreported reasons for judgment of McNeely, J. of the Ontario District Court, March, 1986); R. v. Wong et al (unreported decision of Paris, J., Provincial Court of Ontario, September 15, 1985).

21. R. v. Finlay and Grellette (1986) 48 C.R. (3d) 341 at p. 355.

22. Lofthouse, supra footnote 20 at p. 7.

23. Lofthouse, supra footnote 20 at pp. 14-15.

24. Lofthouse, supra footnote 20 at p. 16.

25. [1984] S.C.R. 145.

26. Ibid at pp. 160-161.

27. Wong, supra footnote 20 at p. 6.

28. Both the Lofthouse and Wong decisions (supra footnote 20) are presently under appeal. In Wong, the Crown took an appeal and the matter was heard October 30 and 31, 1986 by the Ontario Court of Appeal. Judgment was reserved. The Lofthouse appeal, along with two other appeals involving video surveillance in public washrooms has been adjourned for hearing in the Ontario Court of Appeal to January, 1987. This information was supplied to the Police Commission by S. Casey Hill, Senior Counsel with the Ministry of the Attorney General, Toronto, Ontario, who is counsel for the Crown on these appeals.

CHAPTER 7

SURVEILLANCE AND THE RIGHT TO PRIVACY: THE AMERICAN EXPERIENCE

"...the right to be let alone - the most comprehensive of rights and the right most valued by civilized men."

Brandeis, J. in Olmstead v. U.S. (1928) 277 U.S. 438.

INTRODUCTION

To understand the American development of search and seizure is to understand the direction presently taken by the Supreme Court of Canada in its interpretation of s. 8 of the Charter. (1)

The right of privacy in American law is based on certain constitutional provisions (2), the most important of which is the Fourth Amendment to the Federal Constitution, which reads as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (3)

Although the Fourth Amendment was drafted to preserve common law rights (4), it is not so much the intention of the legislators but the manner in which the language of the article has been interpreted by the courts that yields its substantive meaning. The Fourth Amendment is no exception to this rule. (5)

THE FOURTH AMENDMENT AND SEARCH AND SEIZURE

The evolution of the Fourth Amendment is best described by reviewing its interpretation by the U.S. Supreme Court and a useful starting point in this exercise is the case of Olmstead v. U.S. (6) This was a wiretap case involving an interception of Olmstead's telephone line. The Court found that this conduct was not a violation of the Fourth Amendment. In short, "...The Supreme Court had interpreted the Fourth Amendment as applicable only where governmental agents made some physical intrusion into 'a constitutionally protected area'." (7) This limited application of Fourth Amendment protections was to remain the law for the better part of forty years. (8)

The present interpretation of the Fourth Amendment right to privacy by U.S. courts is centered around the 1967 United States Supreme Court case of Katz v. U.S. (9) At issue was the legality of the acts of government agents in attaching listening devices to the outside of a public telephone booth in order to record the defendant's conversations. The Court held that evidence so obtained was not admissible. Although a series a Supreme Court Justices participated by writing separate judgments, the essence of the case lies in the words of Stewart, J.: "For the Fourth Amendment protects people, not places." (10) This was a dramatic shift from the Olmstead position and greatly enlarged the scope of the Fourth Amendment. Stewart, J. went on to say:

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." (11)

Of equal importance are the words of Justice Harlan in attempting to ascertain precisely what protection

the Fourth Amendment accords individuals:

> "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'." (12)

The subjective and objective components of this test have been described in the following manner:

> "The subjective part of the test focuses attention on the means the individual employs to protect his or her privacy...
>
> The objective part of the test looks to what society regards as a reasonable expectation of privacy." (13)

This twofold test of "a reasonable expectation of privacy" has significantly marked subsequent American decisions on the Fourth Amendment (14), although there has been a recent trend in the U.S. Supreme Court to impose a somewhat different test, namely that of "a legitimate expectation of privacy" which if taken to its logical end, would mean that no person could have an expectation of privacy while engaged in criminal conduct. (15) This reflects a conservative trend in the Court apparently aimed at trimming the excesses indulged in by the Warren Court which had given pronounced and definite meaning to both Fourth Amendment protections and the exclusionary rule. (16) Notwithstanding this trend, it would appear that the conventional interpretation of the Fourth Amendment is still intact. (17) This conventional interpretation has three essential elements: a warrant requirement, a probable cause requirement, and an expansive definition of searches and seizures. (18)

THE WARRANT REQUIREMENT AND PROBAPLE CAUSE

The warrant requirement has traditionally meant that warrantless searches are per se unreasonable (19) although the U.S. Supreme Court appears to be moving away

from this view. In a thorough analysis of the Supreme Court's interpretation of the Fourth Amendment and search and seizure law, Professor Silas J. Wasserstrom of the Georgetown University Law Centre has pointed out that the tendency of the U.S. Supreme Court today would be to find that "...(t)he failure to obtain a warrant is, at most, one factor in the evaluation of general reasonableness." (20)

The Supreme Court's treatment of the probable cause test is even more troubling. The long-held judicial view of probable cause was that it was meant to be more than a fifty percent probability:

> "Certainly, the phrase 'probable cause' suggests a quantum of evidence at least sufficient to establish more than a fifty percent probability - at least some sort of more-likely-than-not or preponderance of the evidence standard. Although the court has not expressed the probable cause requirment in these probablistic terms, it has for years consistently stated the requirement in a way that suggests an even higher degree of probability. For what the court has said is that probable cause for an arrest exists where the evidence is 'sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offence' and it has used the equivalent language to describe the quantum of evidence required to justify a search..." (21)

In several recent decisions, the Supreme Court has moved away from this proposition and equated probable cause with "reasonable suspicion". Two cases that illustrate this point are Terry v. Ohio (22) and Illinois v. Gates (23). Terry was a case involving a "stop and frisk". In reviewing the police conduct in question, the Court applied a standard of "articulable and reasonable suspicion" to justify the police conduct. (24) In Gates, Rehnquist, J. (now Chief Justice) applied a test of "fair probability". (25)

These approaches have the effect of reducing the degree of suspicion that must obtain before a search can be

properly embarked upon. Professor Wasserstrom focuses on the importance of the traditional test of probable cause in the following passage:

> "Thus, the 'rule' of probable cause is a constitutional threshold for searches and seizures and it represents a compromise between the competing interests of privacy and crime control." (26)

Inasmuch as these recent decisions of the United States Supreme Court represent a move away from the conventional interpretation of the Fourth Amendment and a move toward a test of "general reasonableness", Professor Wasserstrom is critical. However, he does appear to acknowledge that there is some merit to a "sliding scale" approach (27) which "...permits the police to make certain 'lesser' fourth amendment intrusions on the basis of a lesser quantum of evidence - reasonable suspicion - than is required for those greater intrusions which can be justified only on the basis of probable cause." (28)

TITLE III LEGISLATION

It is clear that the triggering aspect of the Fourth Amendment is a search and seizure. It is because of this that the extension of Fourth Amendment protections in Katz to people rather than places was of such importance.

The effects of Katz have been far-reaching. It was in response to Katz and the earlier Supreme Court decision of Berger v. New York (29) that Congress enacted Title III (30) "...to control the use of electronic eavesdropping by federal law enforcement agents". (31)

In Berger, the Supreme Court struck down a state's eavesdropping statute on the basis that it lacked adequate judicial scrutiny or constitutional safeguards. In doing so, the Court prescribed a number of constitutional

requirements for the issuance of a valid eavesdropping warrant. These include a requirement of probable cause and approval of the application by a neutral and detached person. Katz expanded on this latter aspect, requiring the neutral and detached person to be a judicial officer. It was on the basis of these criteria that the Title III legislation was modelled. (32)

Title III is not the sole legislative enactment in the United States governing wiretap. Numerous states have such legislation in place (33) and the use of surveillance devices is also regulated by the Foreign Intelligence Surveillance Act of 1978 (FISA). (34) Moreover, where there is ambiguity in the law "... executive officials have issued orders and guidelines to clarify the application of specific statutes or protections under particular circumstances or with respect to certain technological devices". (35) This is significant because it demonstrates an initiative aimed at placing surveillance within constitutional bounds. Indeed, as the Office of Technology Assessment of the 99th Congress has noted, policy guidelines issued by the Department of Justice to govern surveillance coincide with the seven general components contained in existing policies and legislation, namely:

"(1) a means of checking on the discretion of the government agent in the field over whether to institute such surveillance;

(2) a listing of the crimes or circumstances for which a particular type of electronic surveillance is considered appropriate;

(3) some standard to indicate the degree of confidence about alleged criminal behaviour that is necessary before the use of a particular surveillance technique is appropriate;

(4) some justification for the need to use a particular surveillance technique or device;

(5) an account of how the scope of the surveillance

will be minimized;

(6) the individual be given some notice after the fact that he or she has been subject to surveillance;

(7) sanctions that apply if evidence is not collected in conformity with the requirements of the statute." (36)

The initiative taken by the U.S. Department of Justice in instituting internal guidelines regarding electronic surveillance is commendable but less than what is required to protect individual rights in a free and democratic society. It is both unrealistic and unfair to expect police and government agencies to adequately monitor and control their own behaviour. (37) The need for legislation is imperative.

U.S. v. TORRES

The major federal legislation governing wiretap in Title III does not apply to video surveillance, and this has been the matter of judicial comment in the case of U.S. v. Torres (38) where Posner, J. of the United States Court of Appeals, Seventh Circuit, speaking for the majority, said:

> "Of course it is anomalous to have detailed statutory regulation of bugging and wiretapping but not of television surveillance, in Title III...and we would think it a very good thing if Congress responded to the issues discussed in this opinion by amending Title III to bring television surveillance within its scope." (39)

And later, referring to both Title III and the Foreign Intelligence Surveillance Act, Judge Posner remarked:

> "And television surveillance for domestic criminal investigations is in neither statute's domain. No doubt this is, as we have said, anomalous; it may seem fairly to cry out for Congressional attention..." (40)

It is worthwhile to take a close look at Torres as it demonstrates the problems faced by a high level American court when dealing with a situation that the legislature has failed to contend with.

In Torres, FBI agents were investigating a notorious terrorist group known as FALN (Fuerzas Armadas de Liberacion Nacionale Puertorriquena, translated as Armed Forces of Puerto Rican National Liberation), a secret organization of Puerto Rican separatists determined to win independence for Puerto Rico. The terrorist activities employed by this group centered around the planting of bombs in public places that had over a period of time resulted in a number of deaths and massive property destruction. Moreover, the activities of the group were difficult to detect or arrest as they had resort to "safe houses" (houses rented under false names) to formulate their plans and construct their bombs. In the course of the investigation, the U.S. Attorney obtained warrants from a District Judge to install both electronic "bugs" and television cameras. At trial, the Court ruled the evidence obtained by the television surveillance inadmissible as well as the fruits of that evidence on the basis that there was no statutory authority for the original television surveillance warrant. The matter went to the Seventh Circuit Court of Appeals.

Posner, J. held that neither Title III nor the Foreign Intelligence Surveillance Act applied to the matter of video surveillance in a case of this nature. (If the matter had involved a situation of national security, the Foreign Intelligence Surveillance Act would likely have applied.) Notwithstanding this, Judge Posner found that the warrant was authorized by both Rule 41 of the Federal Rules of Criminal Procedure and by the common law. In an extensive review of the history of warrants at common law, the Judge held that there was a broadly-based common law

jurisdiction in American courts to issue a search warrant. The problem then became one of what criteria to apply to determine the validity of the warrant. For guidance, Posner, J. turned to Title III:

> "Invoking our common law power to interpret the Constitution in a novel context, we borrow the warrant procedure of Title III, a careful legislative attempt to solve a very similar problem, and hold that it provides the measure of the government's constitutional obligation of particular description in using television surveillance to investigate crime." (41)

In applying Title III criteria, Posner, J. focussed on the issue of particularity surrounding the detail presented to the authorizing judge in support of the application for a warrant. These criteria were that normal investigative procedures be shown to have failed or unlikely to succeed; that the warrant describe the type of communications to be intercepted and the offence to which they relate; that the period of interception not exceed the time necessary to acquire the relevant information; and that the interception be conducted so as to minimize the seizure of non-pertinent or privileged communications.

Posner, J. found that the facts in Torres satisfied these criteria. He then had to make the final determination faced by all courts when testing evidence obtained by a search and seizure against Fourth Amendment protections, namely, the concept of reasonableness:

> "The usual way in which judges interpreting the Fourth Amendment take account of the fact that searches vary in the degree to which they invade personal privacy is by requiring a higher degree of probable cause (to believe that the search will yield incriminating evidence), and by being more insistent that a warrant be obtained if at all feasible, the more intrusive the search is.
>
> . . .

> But maybe in dealing with so intrusive a technique as television surveillance, other methods of control as well, such as banning the technique outright from use in the home in connection with minor crimes, will be required, in order to strike a proper balance between public safety and personal privacy.
>
> . . .
>
> That question is not before us, but we mention it to make clear that in declining to hold television surveillance unconstitutional per se we do not suggest that the Constitution must be interpreted to allow it to be used as generally as less intrusive techniques can be used.
>
> . . .
>
> ...a search could be unreasonable, though conducted pursuant to an otherwise valid warrant, but intruding on personal privacy to an extent disproportionate to the likely benefits from obtaining fuller compliance with the law. '(T)here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.'
>
> . . .
>
> We do not think the Fourth Amendment prevents the government from coping with the menace of this organization by installing and operating secret television cameras in the organization's safe houses. The benefits to the public safety are great, and the costs to personal privacy are modest. A safe house is not a home. No one lives in these apartments, amidst the bombs and other paraphernalia of terrorism. They are places dedicated exclusively to illicit business; and though the Fourth Amendment protects business premises as well as homes...the invasion of privacy caused by secretly televising the interior of business premises is less than that caused by secretly televising the interior of a home, while the social benefit of the invasion is greater when the organization under investigation runs a bomb factory than it would be if it ran a chop shop or a numbers parlour. There is no right to be let alone while assembling bombs in safe houses." (42)

In the result, Posner, J. held that the evidence was admissible, reversed the trial Judge's ruling and remitted

the case for trial.

The importance of Torres is shown by the ingenious manner in which the Court dealt with the troubling problem of intrusive video surveillance conducted in the absence of controlling legislation. In writing his judgment, Posner, J. came perilously close to assuming the role of a legislator, a problem which he recognized and which, in and of itself, makes his cry for controlling legislation all the more resounding.

THE KASTENMEIER BILL

In an address to the House of Representatives on September 19, 1985, The Hon. Robert W. Kastenmeier, in referring to advanced surveillance technology, stated:

> "These new modes of communication have outstripped the legal protection provided under statutory definitions bound by old technologies. The unfortunate result is that the same technologies that hold such promise for the future also enhance the risk that our communications will be intercepted by either private parties or the government." (43)

Mr. Kastenmeier concluded this address by introducing a bill aimed at instituting further protections respecting the interception of electronic communications. Eleven days later, he followed suit by introducing a second bill entitled "Video Surveillance Act of 1985" (44) which was aimed at controlling video surveillance and bringing it under similar strictures to Title III. In his speech to Congress on September 30, 1985, Mr. Kastenmeier referred both to the words of Judge Posner in Torres (45) and to the words of a former Senator:

> "As my former colleague, Senator Tunney, pointed out ten years ago: 'Control over the technology of surveillance conveys effective control over our

privacy, our freedom and our dignity - in short, control over the most meaningful aspects of our lives as free human beings'". (46)

Mr. Kastenmeier's proposed bill on video surveillance had four main features:

(1) It aimed at limiting the use of video surveillance to the same narrow procedural requirements as the wiretap laws.

(2) It required that other less intrusive investigative techniques had first been tried and failed or shown to be unfeasible.

(3) It limited the length of any court order approving the use of video surveillance to thirty days.

(4) It limited the crimes to which video surveillance would be applicable to those punishable by more than ten years imprisonment. (47)

Although laudable in its content, Mr. Kastenmeier's bill failed to achieve legislated status. Indeed, both his bills subsequently died without any hearings and without any Senate interest. (48) This is not to say that these proposed bills will not be revived but simply that they have not as yet passed muster. Accordingly, the United States remains in an identical position to Canada and other Western democracies, none of which have adequate or comprehensive legislation governing video surveillance.

AMERICAN CASE LAW ON VIDEO SURVEILLANCE

It is useful to review the manner in which American courts have dealt with intrusive video surveillance as certain of the fact patterns bear striking similarity to fact patterns currently being faced by Canadian courts. (49)

In the early 1970's, American courts began to contend with the issue of the admissibility of videotape evidence in criminal trials. A number of these cases dealt with the introduction of video recordings demonstrating the intoxicated condition of persons charged with impaired driving. (50) Of greater relevance are those cases involving surreptitious surveillance of individuals engaged in criminal activity. One notable case in this area is that of People v. Teicher.(51) Teicher, a Manhattan dentist, was suspected of molesting female patients while they were under sedation in the dental chair. After trying other investigative techniques which failed, the police sought and obtained a warrant to install a video camera in the accused's examining room pursuant to a state statute. The camera was subsequently installed, videorecorded evidence obtained and the accused convicted at trial. Teicher appealed. The New York Court of Appeals found that the minimal constitutional standards governing the use of electronic surveillance set forth by Berger and Katz had been complied with.

In its ruling, the Court set out the requirements to be met before a warrant authorizing video surveillance should be issued:

(1) That there be a showing of probable cause that a particular person is committing, has committed or is about to commit a crime.

(2) That there be a showing of probable cause to believe that the place where the activity is to be intercepted is being used or is about to be used in connection with the crime by the described person.

(3) That there be probable cause to believe that a particular activity relating to the crime will be observed through the use of the video surveillance.

(4) That the warrant be particularized in describing the place to be searched and the things to be seized and that this particularization include specification of the crime under investigation, specification of the type of activity sought to be captured by the camera and specification of the person expected to be seen performing the activity.

(5) That there be minimization of the recording of activities not related to the crime.

(6) That there are no less intrusive means for obtaining the needed evidence. (52)

In responding to an argument by the appellant, the Court agreed that video surveillance by its very nature involved a high degree of intrusiveness but countered this by saying that such surveillance was not per se unreasonable under the Fourth Amendment and that situations from time to time would arise where such intrusion was necessary because of the state's high interest in gathering evidence.

Teicher is especially noteworthy because the New York Court of Appeals applied the full measure of the constitutional requirements set out in Berger and Katz to video surveillance.

In the case of People v. Dezek (53), the Michigan Court of Appeals applied Fourth Amendment protections to persons using the bathroom stalls of a public restroom. Dezek and others were charged with gross indecency, arising out of homosexual acts performed in the cubicles of a public washroom. Surveillance was conducted by the installation of a video camera, coupled with a needlepoint lens, planted in the ceiling above the stalls. In its ruling, the Court found that the bathroom stalls were similar to the telephone booth in Katz and thus, the constitutional requirements set out in Berger and Katz were applicable. Although the bathroom stalls did not afford complete privacy, an occupant could reasonably expect to enjoy such privacy as the stall

provided. A motion to suppress the video evidence was successful in that the warrant authorizing the video surveillance was based on an affidavit which failed to contain sufficient information to comply with the minimal constitutional requirements.

A similar case with a different result was that of The People v. Hunt (54) where the Michigan Court of Appeals held that the defendant had no reasonable expectation of privacy when he and a female companion had taken over exclusive occupancy of a public restroom for thirty minutes, during which time moans were heard through the restroom door.

If nothing more, these cases illustrate a desire by American courts to apply Fourth Amendment protections and at least, minimal constitutional requirements to situations involving video surveillance.

THE PLAIN VIEW DOCTRINE

No review of the present status of video surveillance in American courts would be complete without reference to the plain view doctrine. Simply stated, the plain view doctrine means that "...mere observation of what is in plain view does not constitute a search". (55) This doctrine can easily be extended to cover situations involving observation and recording by the video camera. A leading case in this area is Decatur v. Kushmer (56) which stands for the proposition that if something can be properly viewed, it may also be photographed. The subject matter in question in Decatur was objects stored in the defendant's yard. These objects were clearly visible from off the property and thus the plain view doctrine applied. (57)

A further extension of this principle is seen in the case of People v. Ward (58) where the police employed a telephoto lens to view and photograph the activities of the defendant on his property. Although the police required a telephoto lens to observe the activities of the defendant, the evidence was nevertheless admissible as the defendant's activities were in plain view of passersby and neighbours. Curiously, the Court implied that "...had the defendant been within the four walls of his own home where he had a reasonable expectation of privacy, the use of a telephoto lens to view his activities therein would have constituted an unreasonable search." (59) This statement is certainly questionable. Would the defendant have a reasonable expectation of privacy if, nothwithstanding that he was within his own home, he could be readily observed through the window by a passerby? Surely, in that situation, he would fail to meet the first (subjective) part of Justice Harlan's two-pronged test for a reasonable expectation of privacy.

There are two lessons to be learned from cases employing the plain view doctrine. Firstly, the rules expounded are as applicable to the video camera as they are to the conventional camera. Secondly, the use of a telephoto lens to enhance ordinary vision has the potential to bring video surveillance into collision with the acceptable standards of search and seizure. When this occurs, the courts will have to fall back on the test of "a reasonable expectation of privacy" in order to make the appropriate determination which will be done on a case by case basis. Although this test has been the subject of criticism (60) because it is flexible and permits wide discretion on the part of a trial judge, it is submitted that this is precisely what is required given the situations that can occur when advanced and sophisticated video equipment is used for surveillance. Moreover, the "reason-

able expectation" test should be measured against the backdrop of the plain view doctrine for it is impossible to imagine a situation where that which is in plain view could be considered the subject of Fourth Amendment privacy protections. As one author has noted:

> "The government must stand in the shoes of the public: It may see, know, and take without a warrant only what members of the public may see, know, and take. So long as an individual has protected his privacy against intrusion by his fellow citizens, he may assume that he has also protected it against governmental interference. Thus, his reliance on Fourth Amendment protection is 'justifiable' where the means he has employed to preserve his privacy are calculated to be effective against reasonably curious members of the public at large." (61)

These words were then expanded in the following passage:

> "This interpretation of Katz does not insist that government investigators employ only those technologies that a reasonably curious person might employ. But it does insist that the government, whether its technology be simple or sophisticated, performs a Fourth Amendment search whenever its investigation achieves results that a reasonably curious person could not achieve. Because the government may intrude only to the extent that reasonably curious persons might intrude, it cannot by unilateral action alter the scope of an individual's 'justifiable reliance' on his privacy. That reliance depends solely upon what other citizens might do and upon the means the individual adopts to protect his affairs from public notice." (62)

Until comprehensive federal legislation akin to Title III is enacted to govern video surveillance, the American courts will have to be guided by the Berger and Katz standards in determining whether the videorecorded evidence in a particular case violates Fourth Amendment protections. This is a poor half-measure given that video surveillance is a vastly more intrusive technique than any

other form of surveillance and absent any punitive measures for those who wilfully violate an individual's privacy by means of the video camera.

Until such time as the legislators bring Title III into step with advances in surveillance technology, the courts are charged with the responsibility of protecting individual rights which must always be measured against valid governmental objectives. In weighing these oft-competing interests, a number of factors will tend to fall on one side of the scales or the other. In this regard, the Office of Technology Assessment has proposed a useful guide for the courts:

> "Dimensions for Balancing Civil Liberty Interest v. Government Investigative Interest
>
> Civil liberty interest:
>
> 1. Nature of information: The more personal or intimate the information that is to be gathered about a target, the more intrusive the surveillance technique and the greater the threat to civil liberties.
>
> 2. Nature of place or communication: The more 'private' the area or type of communication to be placed under surveillance, the more intrusive the surveillance and the greater the threat to civil liberties.
>
> 3. Scope of surveillance: The more people and activities that are subject to surveillance, the more intrusive the surveillance and the greater the threat to civil liberties.
>
> 4. Surreptitiousness of surveillance: The less likely it is for the individual to be aware of the surveillance and the harder it is for the individual to detect it, the greater the threat to civil liberties.
>
> 5. Pre-electronic analogy: Pre-electronic analogies are often considered in determining intrusiveness, but with widely varying interpretations.

Government Investigative Interest:

1. Purpose of investigation: Importance ranked as follows: national security, domestic security, law enforcement, and the proper administration of Government programs.

2. Degree of individualized suspicion: The lower the level of suspicion, the harder it is to justify the use of surveillance devices.

3. Relative effectiveness: More traditional investigative techniques should be used and proven ineffective before using technologically sophisticated techniques." (63)

Even with the assistance of these criteria, the task of balancing the competing interests will never be easy.

CONCLUSION

The American experience of search and seizure has been much more detailed and comprehensive than in Canada, yet despite this and despite the fact that American courts have been testing Constitutional rights for two hundred years, the United States is no nearer to having legislation governing the surreptitious use of the video camera than Canada. The lack of such legislation is, to say the least, troubling. As one author has noted, "...the lack of comprehensive legislation causes uncertainty among courts and provides potential for serious violations of an individual's Fourth Amendment rights." (64) The absence of such legislation in the U.S. will result in individual courts imposing their own standards which will permit great variance in the manner in which the Constitutional right to privacy is subjected to the most intrusive form of surveillance. The words of Posner, J. bear repeating:

> "We think it also unarguable that television surveillance is exceedingly intrusive, especially in combination with audio surveillance, and

inherently indiscriminate, and that it could be grossly abused - to eliminate personal privacy as understood in modern western nations." (65)

Footnotes

1. In its landmark decision on s. 8 of the Charter, Hunter v. Southam [1984] S.C.R. 145, the Supreme Court of Canada drew heavily on American authorities in reaching its conclusions.

   There can be little doubt that the Supreme Court of Canada intends to look closely at American legal precedents in expounding the Constitution. In a recent speech at a convention of the Oregon State Bar held in Vancouver, British Columbia, Estey, J. indicated that the Supreme Court of Canada will now be looking at American legal authorities for assistance and guidance in interpreting the Constitution:

   > "We will now sail our ships closer to the shores of North America. The North American concept of constitutional law will now dominate us."

   (These comments appeared in the "Vancouver Sun", Friday, September 26, 1986 "U.S. Law Called Guide" by Larry Still.)

2. Ernest H. Schopler, "Supreme Courts' Views as to the Federal Legal Aspects of the Right of Privacy" 43 L. Ed. (2d) 871.

3. Amendment IV to the American Bill of Rights.

   As Ernest H. Schopler has stated, "...the basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials" (op. cit. footnote 2 at p. 887).

4. This is a grossly simplified statement. For an excellent and comprehensive history of the Fourth Amendment see Daniel M. Harris, "The Return to Common Sense: A Response to 'The Incredible Shrinking Fourth Amendment'", vol. 22, American Criminal Law Review, p. 25. In that article, the author points out that the Fourth Amendment was drafted not only to solidify the common law of search and seizure, but also to contend with the General Warrant cases which had demonstrated an effort by the British Crown to avoid the probable cause requirements for a valid search.

5. See Silas J. Wasserstrom, "The Incredible Shrinking Fourth Amendment", vol. 21, American

Criminal Law Review, p. 257 at p. 304.

6. (1928) 277 U.S. 438 (Brandeis, J. dissenting).

7. Wasserstrom, op. cit. footnote 5 at p. 266, where the author points out that Brandeis, J., in dissent, viewed the Fourth Amendment as safeguarding "...a more comprehensive right to personal and collective security from arbitrary and unreasonable governmental intrusion by whatever means."

8. For instance, Goldman v. U.S. 302 U.S. 379 where utilizing a device to listen through a wall was held not to violate the Fourth Amendment as there was no physical trespass. It was not until 1961 in the case of Silverman v. U.S. 365 U.S. 505 that intangible voice communications were held subject to Fourth Amendment protections.

9. 389 U.S. 347 (1967). For an excellent analysis of Katz, see Wasserstrom, op. cit. footnote 5 at pp. 266-271.

10. 389 U.S. 347 (1967) at p. 352.

11. Ibid.

12. Ibid at p. 361.

13. "Electronic Surveillance and Civil Liberties", Federal Government Information Technology, Office of Technology Assessment, Congressional Board of the 99th Congress at p. 16.

14. "Tracking Katz: Beepers, Privacy and the Fourth Amendment", 1977, vol. 86, The Yale Law Journal, 1461 at 1462 where it is noted: "Instead of relying on the majority opinion in Katz, the courts have applied the 'reasonable expectation of privacy' standard suggested in a concurring opinion."

15. This would tend to accord with the common law position for, as Daniel M. Harris has pointed out, "...the common law of search and seizure protected legitimate expectations of privacy from unlawful intrusions by government officers. It did not, however, protect illegitimate expectations of privacy, such as a criminal's desire to maintain possession of contraband or the instrumentalities of crime, at least outside of private premises." Op. cit. footnote 4 at p. 28.

16. Wasserstrom, op. cit. footnote 5 at p. 272; Harris, op. cit. footnote 4 at p. 48.

17. Wasserstrom, op. cit. footnote 5 at pp. 263-264.

18. Wasserstrom, op. cit. footnote 5 at pp. 263-264.

19. This is also the position taken by Dickson, C.J. in Hunter v. Southam, supra footnote 1, where at p. 161, he stated as follows:

> "...in Katz, Stewart, J. concluded that a warrantless search was prima facie 'unreasonable' under the Fourth Amendment. The terms of the Fourth Amendment are not identical to those of s. 8 and American decisions can be transplanted to the Canadian context only with the greatest caution. Nevertheless, I would in the present instance respectfully adopt Stewart, J.'s formulation as equally applicable to the concept of 'unreasonableness' under s. 8, and would require the party seeking to justify a warrantless search to rebut this presumption of unreasonableness."

20. Wasserstrom, op. cit. footnote 5 at p. 281.

21. Wasserstrom, op. cit. footnote 5 at p. 306.

22. 392 U.S. 1 (1968).

23. 103 S.Ct. 2317 (1983).

24. Wasserstrom, op. cit. footnote 5 at p. 305.

25. Supra footnote 23 at p. 2332.

26. Wasserstrom, op. cit. footnote 5 at p. 337.

27. Wasserstrom, op. cit. footnote 5 at pp. 309-310.

28. Wasserstrom, op. cit. footnote 5 at p. 309.

29. 388 U.S. 41 (1967).

30. Title III of the 1968 Omnibus Crime Control and Safe Streets Act.

31. S. Richard Arnold, "Electronic Visual Surveillance and the Right to Privacy: When is Electronic Observation Reasonable?", 1978, vol. 35, Washington and Lee Law Review, 1043 at p. 1047.

32. As to the legislative history of Title III, see "The Legislative History of Title III; Senate Report No., 1097" reproduced in David Watt, Law of Electronic Surveillance in Canada, 1979, Carswell at p. 359, app. "A".

33. Op. cit. footnote 13 at p. 19.

34. Indeed, the Foreign Intelligence Surveillance Act is set in sufficiently broad terms to cover television surveillance.

35. Op. cit. footnote 13 at p. 20 where the Office of Technology Assessment stated:

> "In the absence of statutory or judicial guidance in the use of electronic surveillance for law enforcement and intelligence purposes, the Department of Justice (DOJ) generally issues policy guidelines that are regarded as requirements on agents of DOJ bureaus (FBI, Immigration and Naturalization Service and Drug Enforcement Administration), and are usually considered as advisory by other agencies engaged in surveillance activities (e.g., Customs, Bureau of Alcohol, Tobacco and Firearms, IRS)."

36. Op. cit. footnote 13 at pp. 21-22.

37. Professor Wasserstrom, op. cit. footnote 5 at p. 292, fn 185, has stated: "Not surprisingly, effective self-regulation by the police through departmental rulemaking has been 'minor to the point of non-existence." In this statement, Professor Wasserstrom is partially quoting from McGowan, "Rulemaking and the Police", 70 Mich. L. Rev. 659, (1972) at p. 667. In his article, McGowan said:

> "It is clear that such legal resources must be forthcoming for the police if they are to be accorded a larger role in the formulation of rules governing their own conduct.
>
> Up to this point in time, of course, that role has been minor to the point of non-existence. Everybody, it sometimes seems, makes rules for the police but the police themselves. Certainly it is true, to the extent police conduct in enforcing the criminal law is subject to explicit prescriptions, these have emanated from sources external to the police, notably courts and

legislatures." (at p. 667).

38. 751 F. (2d) 875 (1984).

39. Ibid at p. 885.

40. Ibid at p. 886.

41. Ibid at p. 885.

42. Ibid at pp. 882-883.

43. "Congressional Record - Extensions of Remarks", September 19, 1985, E4128-E4129.

44. 99th Congress, First Session, H. R. 3455.

45. "Congressional Record - Extensions of Remarks", September 30, 1985, E4269-E4270.

46. Ibid.

47. Ibid.

48. This information was supplied to the Police Commission by Glen Berry of the Canadian Embassy in Washington, D.C., June 24, 1986.

49. Two cases that have followed Torres are U.S. v. Iannillo 621 F. Supp. 1425 (D.C.N.Y. 1985) and U.S. v. Biasucci 786 F. (2d) 504 (2nd Cir. 1986).

50. See for instance, People v. Ardella 276 N.E. (2d) 302 (1971), People v. Knight 327 N.E. (2d) 518 (1975) and Palmer v. State 604 p. (2d) 1106 (1979).

51. 422 N.E. (2d) 506 (1982).

52. Ibid at pp. 514-515.

53. 308 N.W. (2d) 652.

54. 259 N.W. (2d) 147 (1977).

55. (1984) 27 A.L.R. (4th) 531 at p. 533.

56. 253 N.E. (2d) 425 (1969).

57. A similar result occurred in State v. Dickerson 313 N.W. (2d) 526 (1981).

58. 308 N.W. (2d) 664 (1981).

59. Supra footnote 55 at p. 536; But see the recent U.S. Supreme Court decision of California v. Ciraolo 39 Cr. L. 3106 No. 84-1513 where, in a five to four decision, the Court upheld a warrantless aerial surveillance of a suburban fenced yard where police suspected marihuana was growing. The Court held that the police did not need a warrant to conduct aerial surveillance of an area that a pilot could legally fly over. Writing for the majority, Burger, C.J. stated: "Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed." Indeed, the observations gained through this aerial surveillance were used to justify the obtaining of a search warrant and the subsequent seizure of 73 marihuana plants.

60. Professor Wasserstrom, op. cit. footnote 5 at pp. 269-271, is critical of this definition:

> "Moreover, although the privacy-based approach of Katz was expected to open a new chapter in fourth amendment jurisprudence, privacy is a notoriously elusive concept. The Warren Court explained neither what it meant by privacy, nor why, and in what contexts, privacy should be accorded fourth amendment protection at all. Yet without some explanation of how privacy relates to more ultimate individual and societal goals and values, and of how the fourth amendment furthers these interests by protecting privacy, there is no principled way to decide what makes a reliance on privacy 'justifiable', or an expectation of privacy 'reasonable'. As a result, these formulas are now little more than readily manipulable cant; a 'justifiable', 'reasonable', or as the Court now puts it with increasing emphasis, 'legitimate', expectation of privacy is simply one which a majority of the Court wants to accord fourth amendment protection."

A similar criticism was levelled at the phrase "reasonable expectation of privacy" by the Office of Technology Assessment, op. cit. footnote 13 where, at p. 18, it was stated:

> "'Reasonable expectation of privacy' is an inherently nebulous phrase and, despite twenty years of judicial application, predicting its meaning in a new context is difficult."

61. Op. cit. footnote 14 at p. 1482.

62. Ibid at p. 1484.

63. Op. cit. footnote 13 at p. 22.

64. Nancy J. Montroy, "Recent Developments in Public Law: United States v. Torres: The Need for Statutory Regulation of Video Surveillance", 1985, Vol. 12, Journal of Legislation, 264 at p. 269. In this article, the author is critical of the majority judgment in Torres, arguing that Posner, J. failed to impose complete Title III safeguards to video surveillance, thus permitting this most intrusive form of surveillance to occur with lesser safeguards than wiretap. Although there is some merit to this argument, it must be remembered that Posner, J., for the majority, was taking an innovative and near legislative step in imposing Constitutional standards on video surveillance and the real thrust of the judgment was aimed at impressing upon Congress the need for legislative reform.

65. Supra footnote 38 at p. 882; Montroy, op. cit. footnote 64, makes similar comments:

> "Video surveillance is inherently more intrusive than wiretapping or bugging. Its potential for abuse is great. As opposed to wiretapping, video surveillance is a continuous and uninterrupted search. Whereas oral interception is limited to periods of actual communications, video surveillance cannot be limited merely to the times of activity, criminal or otherwise. Thus, video surveillance poses an excessive and unnecessary invasion of personal privacy by filming every aspect of a person's life in order to record criminal activity.
>
> Moreover, the privacy interest actually invaded by video surveillance is much greater than the invasion posed by Title III interception. The moment one person speaks with another, he has lost part of the expectation of privacy accorded to the speech. A person spoken to can always relate what he has heard. On the other hand, when a person believes he is alone, absent any known observers, he has an absolute expectation of privacy even if engaging in criminal activity. While electronic eavesdropping may

be avoided by maintaining silence, video surveillance is literally inescapable."

at pp. 269-270.

CHAPTER 8

THE RIGHT TO PRIVACY IN CANADA

"Section 8 (of the Charter)...guarantees a broad and general right to be secure from unreasonable search and seizure."

Dickson, C.J. in Hunter v. Southam [1984] 2 S.C.R. 145.

HISTORICAL PERSPECTIVE

Writing on the value of privacy in 1980, Arthur Schafer stated:

> "The ideal of privacy is clearly one of the fundamental values of our culture. In general, Western societies place a high value upon the right to privacy." (1)

Interestingly, Schafer referred to privacy as a right at a time when it was largely doubted to exist as such at common law. (2) He was in good company. Over the years there have been numerous references to this "right" by jurists and academics alike. (3)

One view of privacy was that it was merely an aspect or adjunct of other rights (4) which, when enforced, redressed the injury caused by intruding on the plaintiff's "privacy right". (5)

Another view was that privacy had long since existed as a right but had not been formally recognized and it was this theory that prevailed in the United States following the hallmark work of Brandeis and Warren in their classic treatise "The Right to Privacy" (6):

> "If we are correct in this conclusion, the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion, either by the too enterprising press,

> the photographer or the possessor of any other modern device for recording or reproducing scenes or sounds." (7)

Indeed, their conclusion influenced the thinking of the time to such an extent that the majority of the individual states eventually recognized privacy as a separate and distinct legal right. (8) Such recognition, however, did not extend across the border and a right to privacy remained unrecognized in this country although in the late 1960's and early 1970's, there were several legislative enactments which, if not recognizing privacy as a distinct legal right, certainly gave the ideal of privacy remedies and protections that had not previously been available. (9)

To be sure, neither the Privacy Acts of British Columbia, Saskatchewan, Manitoba or Newfoundland, nor the provisions of Part IV.1 of the Criminal Code make reference to a right to privacy, but all pay apparent heed to the notion that the protection of privacy "ought to be assigned a high priority by society". (10) The words "apparent heed" are used advisedly. In British Columbia, the provisions of the Privacy Act which create a statutory tort have been little used (11) and the Part IV.1 provisions of the Code are less designed to protect private communications from intrusion and eavesdropping than they are designed to be procedural requirements governing police conduct in the interception of private communications. (12)

With the introduction of the Part IV.1 legislation, the way was paved for the police to actively intercept and record private conversations once the applicant seeking an authorization to intercept private communications had complied with certain screening procedures. These procedures, however, had no application

to video surveillance. The courts could not apply Part IV.1 provisions to the surreptitious videotaping of individuals in private settings because the language of Part IV.1 limited the application of that section to oral communications and telecommunications, neither of which embraced videotaping that had no accompanying audio portion. (13) This was an anomaly that ran contrary to the basic tenets of legal process.

Thus, the situation that prevailed in Canada in the early 1980's was one where not only was there no recognized right to privacy but also where existing protections respecting the interception of oral communications had no application to the surreptitious videotaping of individuals in circumstances where they could be said to have a "reasonable expectation of privacy". (14) At least part of this would soon change.

THE CHARTER

On April 17, 1982, the Constitution Act was proclaimed and with it the Canadian Charter of Rights and Freedoms. (15) Section 8 of the Charter of Rights and Freedoms states:

> "Search or Seizure
>
> 8. Everyone has the right to be secure against unreasonable search or seizure."

This section was soon to become the focus of the Supreme Court of Canada in its landmark decision of Hunter v. Southam. (16) At issue in Hunter v. Southam was the validity of a search and seizure pursuant to s. 10(3) of the Combines Investigation Act (17). In the course of its judgment, the Court found that s. 8 of the Charter embraced a broadly based right of privacy and in doing so, utilized the standard of "reasonable expectation";

> "The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from 'unreasonable' search and seizure, or positively as an entitlement to a 'reasonable' expectation of privacy, indicates that an assessment must be made as to whether in a particular situation, the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement." (18)

Speaking for the Court, Dickson, J. (now Chief Justice Dickson) applied the reasoning in the hallmark American case of Katz v. U.S. (19) holding that s. 8 guaranteed "a broad and general right to be secure from unreasonable search and seizure". (20) Moreover, search and seizure was not limited to searches and seizures of tangible property. As one author has stated:

> "In holding that s. 8 is based on the protection of privacy rather than the protection against trespass, the court appears to be saying that for the purposes of s. 8, a search is not limited to a physical incursion onto the property of another, and a seizure need not involve the taking of anything tangible.
>
> If this is what the Supreme Court of Canada is saying, then the impact on criminal law will clearly be profound." (21)

It would now appear that privacy can be invaded by the seizing of intangible property such as oral communications and visual images. (22) Indeed, this has been the very conclusion reached by a number of courts in recent cases dealing with both wiretap interceptions and video surveillance. (23)

PRIVACY AND VIDEO SURVEILLANCE

There can be no more offensive invasion of a person's privacy than the viewing and videotaping of

intimate and personal acts carried on in a private setting. (24) Yet, recent experience has shown that neither the bedroom (25) nor the bathroom (26) is safe from video intrusion. The words of Brandeis and Warren almost one hundred years ago are decidedly prophetic:

> "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops'." (27)

The courts are now poised to scrutinize and reject evidence that has been obtained by invading the privacy of an individual in a manner inconsistent with Charter rights. Recent cases indicate that the Supreme Court of Canada intends to put teeth into the exclusionary provisions of the Charter. (28) Moreover, the Charter speaks to other remedies and it may well be that both damages and the remedy of injunction will be available to those whose rights have been infringed. (29)

SECTION 8 AND "REASONABLENESS"

Whether videotape evidence obtained by invading privacy would comply with the provisions of s. 8 turns on a number of factors, including:

1. The manner in which the evidence was obtained.
2. The degree to which the individual's privacy was invaded, including the nature of the acts filmed.
3. The nature of the offensive conduct being investigated and the importance for the state to suppress such conduct.

The one concern underlying all these factors is the concept of "reasonableness". As a starting point, the question of whether an individual's privacy has been invaded

will turn on the meaning to be ascribed to the phrase "reasonable expectation of privacy". (30) It is no surprise that Dickson, C.J. employed this phrase in Hunter v. Southam in preference to other tests. The phrase "reasonable expectation of privacy" is sufficiently flexible to allow the court of the day the latitude it needs to give necessary expression to s. 8 rights. Moreover, this phrase must always be viewed in the context of "...the citizen's reasonable expectation of privacy in a free and democratic society". (31) The concept of a reasonable expectation of privacy is a dynamic one that will change with the evolving customs and mores of a society. To attempt to fix standards that define specific situations or settings for privacy would be both foolhardy and contrary to the application of constitutional interpretation. The Charter must have the potential for "growth and adjustment over time". (32)

The words "reasonable expectation of privacy" allow the courts to make the necessary determination on a case by case basis. Similar conduct in slightly different settings will result in different conclusions. A man standing naked against his livingroom window in broad daylight could hardly be said to have a reasonable expectation of privacy, whereas the same man performing the same act in the dead of night might well have such an expectation, notwithstanding the ability of available technology to videorecord his every movement. The illustrations are endless. Each case must turn on its own facts.

In Hunter v. Southam, Dickson, C.J. said that the constitutionality of a search and seizure "...must focus on its 'reasonable' or 'unreasonable' impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective". (33) He went on to say that "...an assessment must be made as to

whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement". (34)

In a recent case in Ontario, the accused was charged with gross indecency under s. 157 of the Criminal Code. (35) In the course of his trial, exception was taken to the admissibility of videotape evidence secured by a hidden camera filming the conduct of the accused while sequestered in the cubicle of a public washroom. In ruling on a motion by the accused that his right to be secure from unreasonable search and seizure under s. 8 of the Charter had been infringed, McNeely, J. held "...that so intrusive a search as we have in the present case authorized by no-one other than the police themselves, cannot measure up to the constitutional standard of reasonableness". (36) In coming to this conclusion, McNeely, J. relied heavily on Hunter v. Southam and based his finding of unreasonableness largely on the fact that there was no prior judicial scrutiny of the decision to videotape the accused. In short, he held that the search and seizure (the videotaping) was unjustified because there had been no prior judicial authorization and therefore, was an unreasonable interference with the accused's s. 8 rights.

THE CONCEPT OF PRIOR AUTHORIZATION

In Hunter v. Southam, Dickson, C.J. applied the reasoning in Katz and stated that under s. 8, he would "...require the party seeking to justify a warrantless search to rebut this presumption of unreasonableness". (37) In holding that warrantless searches are prima facie "unreasonable", Dickson, C.J. was qualifying an earlier statement where he said with respect to the purpose of s. 8:

> "That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation.
>
> A requirement of prior authorization, usually in the form of a valid warrant, has been a consistent prerequisite for a valid search and seizure both at common law and under most statutes. Such a requirement puts the onus on the state to demonstrate the superiority of its interest to that of the individual. As such, it accords with the apparent intention of the Charter to prefer, where feasible, the right of the individual to be free from state interference to the interests of the state in advancing its purposes through such interference." (38)

It is quite clear from these words that included in the concept of reasonableness is a requirement for prior authorization. Clearly, this authorization should be by a person independent from the applicant for such authorization and impartial as between the parties. As Dickson, C.J. said, "The person performing this function need not be a judge, but he must, at a minimum, be capable of acting judicially". (39)

There is eminent logic in tying the concept of prior authorization to the concept of reasonableness. Not to do so, would enable the police to conduct surveillance of persons acting in private virtually at will. The fact that an individual had been videotaped would only come to light if the evidence obtained was introduced at trial. The individual would then have to rely upon the exclusionary provisions of s. 24(2) which would be cold comfort given that the acts in question had been observed by third parties. Equally, it is antithetical to the state's interest not to have a system of prior authorization because

the absence of same renders evidence obtained prima facie unreasonable. This leaves the police with no clear guidelines to assist them in the investigation of crime and the Crown with evidence that may very well be inadmissible.

REASONABLE AND PROBABLE GROUNDS

In arriving at a determination as to the balance between the right to privacy and the legitimate needs of the state, Dickson, C.J. sought the assistance of an objective standard for a prior authorization in a case of search and seizure. His purpose was to avoid having the necessary Constitutional balance dependent on "...the subjective appreciation of individual adjudicators." (40)

In arriving at an acceptable objective standard to guide those charged with the responsibility of granting search and seizure authorizations, Dickson, C.J. rejected the test of "reasonable belief" which he found to be "...a very low standard which would validate intrusion on a basis of suspicion, and authorize fishing expeditions of considerable latitude." (41) After reviewing common law standards and existing Criminal Code standards, he concluded that as a minimum, reasonable and probable grounds was the standard required for authorizing a search and seizure that would be consistent with s. 8 of the Charter. (42) In doing so, he implied that a sliding scale might well be necessary to accommodate different situations depending on the importance of the state's law enforcement needs and the degree to which the individual's privacy was to be intruded:

> "The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly based probability replaces suspicion. History has confirmed the appropriateness of this

> requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement. Where the state's interest is not simply law enforcement as, for instance, where state security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one." (43)

The imposition of a minimum standard of reasonable and probable grounds to govern search or seizure situations creates an objective threshold test for those granting prior authorizations. This test has been subsequently followed, particularly in the case of R. v. Finlay and Grellette. (44) In that case, the Ontario Court of Appeal, in dealing with a Constitutional challenge to the validity of Part IV.1 of the Code, held that in the granting of an authorization to intercept private communications, the Part IV.1 legislation "...imports as a minimum requirement that the authorizing judge must be satisfied that there are reasonable grounds to believe that a particular offence...has been or is being committed." (45) Although none of the provisions of Part IV.1 (particularly ss. 178.12 and 178.13) specifically refer to reasonable and probable grounds, the Ontario Court of Appeal concluded that the purport of the legislation embodied this test as a minimum requirement. This accords with Dickson, C.J.'s ruling in Hunter v. Southam.

CONCLUSION

Canadians now enjoy a broadly-based right to privacy and where the government desires to intrude upon that right, certain preconditions based on reasonableness, prior authorization and probable cause must be met in order to afford the individual full protection. Notwithstanding this, a grave problem exists in this country when the government seeks to intrude on privacy by the means of intrusive video surveillance. Whereas legislation is in place for the interception of private communications, no

such legislation exists for the capturing of visual images by videotape surveillance. This is a situation that begs for change.

Footnotes

1. Arthur Shafer, "Privacy: A Philosophical Overview", in Aspects of Privacy Law, edited by Dale Gibson, 1980, Butterworth's, at p. 14.

2. See for instance: Peter Burns, "Privacy and the Common Law: A Tangled Skein Unravelling?", in Aspects of Privacy Law, edited by Dale Gibson, 1980, Butterworth's, pp. 21-40 at pp. 21-22; Brian Neill, "The Protection of Privacy", in "The Modern Law Review", July, 1962, Vol. 25, No. 4, pp. 393-405 at page p. 394: "It can be stated with some confidence that English law does not recognize what Judge Cooley called 'the right to be let alone'."; Jane Swanston, "Protection of Privacy", in "The Australian Law Journal", February, 1974, Vol. 48 at p. 91; William Prosser, Law of Torts, 4th ed. at page 802; Allan Linden, Canadian Tort Law, 3rd ed., 1982, Butterworth's, at p. 50: "...the matter remains open in Canada - the right to privacy may not have been adopted, but neither has it been rejected."; W. W. V. H. Rodgers, Winfield and Jolowicz on Tort, 10th ed., 1975, Sweet and Maxwell at p. 491: "There is no English decision which recognizes any unqualified right of personal privacy."; R. F. V. Heuston, Salmond on the Law of Torts, 17th ed., 1977, Sweet and Maxwell at p. 34.

3. In the case of Prince Albert v. Strange (1849) 1 Mac & G. 25. 47; 41 E.R. 1171, Lord Cottenhem averted to privacy as a right; as well, see the comments of Roland Penner, "Illegally Obtained Evidence and the Right to Privacy", in Aspects of Privacy Law, op. cit. footnote 1; The phrase "the right to be left alone" is attributed to Judge Cooley in Cooley, Torts, 2d ed., 1888, p. 29.

4. Burns, op. cit. footnote 2 at p. 22; Neill, op. cit. footnote 2 at p. 394.

5. For instance, an action in trespass for breaking and entering the plaintiff's house Entick v. Carrington (1765) 19 St.Tr. 1029 or an injunction to enforce proprietary rights Prince Albert v. Strange (supra footnote 3).

6. (1890) 4 "Harvard Law Review" No. 5, p. 193.

7. Ibid at p. 206.

8. Neill, op. cit. footnote 2 at p. 396.

9. Privacy Act, R.S.B.C. 1979, c. 336 (first proclaimed 1968); Privacy Act, R.S.S., c. P-24 (1973-74); Privacy Act, S.M., 1970, c. 74; Privacy Act (Nfld.) c. 6, 1981; Part IV.1 of the Criminal Code of Canada, 1973-74, c. 50, s. 2.

10. Op. cit. footnote 1 at p. 17.

11. There has only been a smattering of cases under the Privacy Act, R.S.B.C. 1979, c. 336. Most recently, Silber v. B.C. T.V. Broadcasting System Ltd. (1986) 69 B.C.L.R. 34, and I.C.B.C. v. Somosh (1984) 51 B.C.L.R. 344; One author has referred to the Privacy Act of B.C. as "a non-development": Peter Burns, "The Law and Privacy: The Canadian Experience", 1976, "Canadian Bar Review", Vol. 54 at p. 33.

12. See Stanley A. Cohen, Invasion of Privacy: Police and Electronic Surveillance in Canada, Carswell 1983, at pp. 68-72.

13. R. v. Biasi et al (No. 3) (1982) 66 C.C.C. (2d) 566 at p. 568; David Watt, Law of Electronic Surveillance in Canada, Carswell, 1979 at p. 48: "It is submitted that video surveillance without any sound recording accompaniment and not engaged in for the purpose of acquiring the conversational content of the subject's oral or telecommunications is not regulated by the provisions of Part IV.1."

14. This phrase is similar to the wording of the definition of "private communication" in s. 178.1 of the Criminal Code. It appears to be derived from American law and particularly, the case of Katz v. United States, 389 U.S., 347 (1967). Other tests from the United States include "justifiable expectation of privacy" (Avery v. State, 292 A. (2d) 728 (1972), and U.S. v. White, 401 U.S., 745) and "legitimate expectation of privacy" (Couch v. The United States, 409 U.S., 322 (1973), and Powell v. Miller, 425 U.S., 435 (1976)).

15. The Constitution Act, 1982, ss. 1-34.

16. [1984] S.C.R. 145.

17. Combines Investigation Act, R.S.C. 1970, C-23.

18. Supra footnote 16 at p. 159.

19. Supra footnote 14.

20. Supra footnote 16 at p. 158.

21. William F. Ehrcke, "Privacy and the Charter of Rights" in "The Advocate", Vol 43, Part 1, January, 1985, pp. 53-59 at p. 57.

22. In the case of People v. Teicher, 422 N.E. (2d) 506, the New York Court of Appeals held that "an intangible visual image secured by a video recording" could come within the definition of having been seized (pp. 512-513). A similar proposition was rejected in the British Columbia case of R. v. Porter, unreported, B.C. County Court, January 17, 1983 (see p. 8). It is doubtful that Porter would be decided in the same way today given the ruling of the Supreme Court in Hunter v. Southam, supra footnote 16.

23. R. v. Finlay and Grellette (1986) 48 C.R. (3d) 341 where, at p. 355, Martin, J.A. notes that "counsel for the Attorney General of Canada and counsel for the Attorney General of Ontario, Intervenant, concede that the interception of private communications constitutes a search or seizure within the meaning of s. 8 of the Charter, and that legislation authorizing such interception must meet the constitutional standard of reasonableness. I agree that private communications are protected by s. 8 of the Charter.": In R. v. Lofthouse, unreported reasons for judgment of McNeely, J. of the Ontario District Court, March, 1986, where a similar conclusion was reached: " I am satisfied that the capturing or seizing of images by videotaping is a search and seizure under s. 8." (pp. 8-9); see also R. v. Wong et al, unreported decision of Paris, J., Provincial Court of Ontario, September 15, 1985.

24. In a meeting with the Police Commission, Harold Levy, then acting Secretary and Counsel to the Law Reform Commission of Canada, expressed his view that surreptitious videotaping was qualitatively more intrusive than the interception of private communications.

25. In R. v. Blakely (the "Top Hat" case), Victoria County Court November, 1985, Hutchison, Co.Ct.J. presiding, the accused was charged with a series of offences, including "procuring" under s. 195(1) of the Criminal Code of Canada. The allegation of the Crown was that the accused, in carrying on the business of an escort service, was in fact running a front for a prostitution ring. In order to

secure evidence to prove the s. 195(1) offence, the police surreptitiously videotaped sexual acts involving a female employee of the escort service and numerous male customers carried out in a Victoria motel room. Neither the female employee nor the male customers were charged with any offence nor was the videotape adduced as evidence at trial.

26. In R. v. Lofthouse, supra footnote 23, video cameras were installed to film the acts of male persons in the cubicle of a public washroom in order to obtain evidence to support a charge of gross indecency contrary to s. 157 of the Criminal Code.

27. Op. cit. footnote 6 at p. 195.

28. See Regina v. Therens, [1985] 1 S.C.R. 613, 45 C.R. (3d) 97 and Clarkson v. R. (1986) 50 C.R. (3d) 289.

29. The question of damages under s. 24(1) of the Charter was discussed in a recent paper by Ken Cooper-Stephenson entitled "Claims for Damages under s. 24(1) of the Charter" given at the Stanford Lectures of the Canadian Institute for Advanced Legal Studies, July, 1986; As for the remedy of injunction, see Robert J. Sharpe, "Injunctions on the Charter" in the "Osgoode Hall Law Journal" Vol. 22, No. 3, p. 473.

30. Supra footnote 16 at p. 159: "The guarantee of security from unreasonable search and seizure only protects a reasonable expectation."

31. These are the words of Prowse, J.A. quoted with approval by Dickson, C.J. in Hunter v. Southam, supra footnote 16 at p. 159.

32. Ref. re s. 94(2) of Motor Vehicle Act, R.S.B.C. 1979, c. 288 (1986) 48 C.R. (3d) 289 at p. 314. Similar language is used by Dickson, C.J. in Hunter v. Southam, supra footnote 16 at p. 155, where, in referring to the Charter, His Lordship stated: "It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind."

33. Supra footnote 16 at p. 157.

34. Ibid at pp. 159-160.

35. R. v. Lofthouse, supra footnote 23.

36. Ibid at p. 11.

37. Supra footnote 16 at p. 161.

38. Ibid at p. 160.

39. Ibid at p. 162.

40. Ibid at p. 166.

41. Ibid at p. 167.

42. Ibid at p. 168.

43. Ibid at pp. 167-168.

44. R. v. Finlay and Grellette, supra footnote 23.

45. Ibid at p. 365.

CHAPTER 9

RECOMMENDATIONS

"The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community..."

Oliver Wendell Holmes, "The Common Law" 41 (1938).

INTRODUCTION

Remarkable technology is now available to police forces enabling undetectable visual surveillance of the most intimate settings. As one author has stated:

> "Surveillance, in an earlier, less complicated era, was of only minor concern to the Canadian state. The same cannot comfortably be said in the 1980's." (1)

Into this setting of ever-advancing technology, the Charter has been introduced and collisions are inevitable. Indeed, the Supreme Court of Canada has taken the lead in giving broad and purposeful meaning to the Charter (2) and this has been demonstrated by the Court in holding that an individual right to privacy exists in s. 8. (3) Nor is s. 8 the only article of the Charter where such a right to privacy may be seen to exist. The Court has found in s. 7 a substantive rather than a procedural application and has indicated an intention to interpret this section in a broad and flexible manner. (4) Certainly the argument can be made that a broad right to privacy is secured by the words "Everyone has the right to life, liberty and security of the person...". Whether such an argument will be necessary will depend on subsequent interpretations of s. 8.

It is against this backdrop that the Police Commission makes its recommendations. The Commission recognizes that individuals must be secure in their right to privacy as well as the need in a democratic society for citizens to be able to carry on their personal affairs without unnecessary, unwarranted or unsanctioned interference by the state. On the other hand, it is imperative that the state, through its police forces, not be hindered in its efforts to enforce the law.

CONSIDERATIONS

Federal legislation is not only appropriate but necessary to bring the surreptitious use of the video camera within a framework similar to Part IV.1 of the Criminal Code. It is illogical for Parliament to enact legislation controlling one aspect of privacy while leaving another aspect uncontrolled. The measure of a democratic society is the nature of the rights it confers on its citizens, the value it places on those rights and the protections that it provides for those rights. The Commission has found that the protections accorded the right of privacy are woefully inadequate.

Although the remedies provided by ss. 24(1) and 24(2) of the Charter have a definite impact, they are of little solace to a citizen whose privacy right has been violated. These remedies, which by definition occur after the harm has been done, are inadequate protections in such circumstances.

The Commission acknowledges that on occasion the invasion of an individual's privacy by the state may be necessary but in those situations, the test of reasonableness must be applied in making the assessment "as to whether...the public's interest in being left alone by

government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement." (5)

In Hunter v. Southam (6), the Supreme Court of Canada concluded that to justify state intrusion upon a citizen's right to privacy, a system of prior authorization was a necessary prerequisite. (7)

Dickson, J. felt that "where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure." (8) Failure to obtain prior authorization would result in "a presumption of unreasonableness". (9)

The Court then went on to hold that the person charged with the task of granting a prior authorization be capable of acting "...in an entirely neutral and impartial manner. ... The person performing this function need not be a judge but he must at a minimum be capable of acting judicially." (10)

The lessons to be derived from these passages are clear-cut:

(a) A system of prior authorization is a prerequisite to a valid search and seizure.

(b) The person making the assessment involved in a prior authorization must be a judge or a person capable of acting judicially.

(c) The concept of reasonableness is the test against which the assessment is to be made as to whether in a given case the state's interest should override the individual's right.

(d) Credibly based probability is the threshold for granting an authorization.

In requesting the Police Commission to advise him

as to any recommendations it might have, the Attorney General made it clear that the Police Commission should consider the balance to be drawn between the rights of the individual and the state's interest, particularly in the area of law enforcement. Seen in this light, it is clear that valid federal legislation is necessary, both in terms of ensuring that Canadian citizens have firm protections for the right to privacy and to ensure that, where legitimate and necessary, evidence gathered by the police that intrudes on such a right be admissible in a court of law. In the absence of legislation to govern surreptitious video surveillance, it is doubtful that evidence obtained by such investigatory methods would be admissible. (11) Moreover, the Commission has been advised by different police officials that legislation governing video surveillance is certainly anticipated and potentially helpful. (12)

The Commission is of the view that individual police forces in the Province of British Columbia should have in place a set of guidelines to internally govern their use of video equipment in the course of criminal investigations. As has been seen, the R.C.M.P. already have in place such policies but they stand alone in that regard. The Commission feels that internal controls or guidelines are a useful first step toward ensuring that video surveillance is only conducted when necessity demands.

RECOMMENDATIONS

I. **That the Federal Government enact legislation governing intrusive video surveillance.**

This would involve both creating an offence and setting up a system of prior authorization.

The Commission has had the benefit of reviewing

both the proposals contained in the recent Law Reform Commission working paper (13) and proposals made by The Hon. Robert W. Kastenmeier in the U.S. House of Representatives. (14)

In its recent review of electronic surveillance law, the Law Reform Commission had the following proposals:

> "8. That it be an offence to enter private property without a court order or the consent of the owner or lawful occupier for the purpose of installing an optical device.
>
> 9. That an authorization to install an optical device be available by application to a court, but only under the same conditions as an authorization is available for installation, by surreptitious entry, of a listening device.
>
> 10. That 'optical device' be defined for the present time as any electronic device or mechanism capable of permitting surreptitious viewing of persons or things." (15)

With respect, the Police Commission feels that the offence proposed above is too narrow and unnecessarily confined to the concept of physical trespass. The Police Commission is of the view that given present technology, the video camera is quite capable of intruding into private settings without a physical trespass being necessary. The Police Commission also takes note of the Law Reform Commission's comments immediately preceding Recommendation 8:

> "It is, however, possible to identify one narrow area where the issues are clear and the privacy interest high, that is, the surreptitious entry of private premises by governmental officials to install optical devices." (16)

The Law Reform Commission did not confine its considerations to video equipment but extended it to the larger definition of "optical device". The Police Commission is generally in agreement with the broader

definition recognizing that surveillance and the capturing of visual images can be achieved by other types of cameras. However, the Police Commission has restricted its conclusions and recommendations to video cameras because of the terms of reference.

The Kastenmeier Bill defines video surveillance in the following manner:

> "...the term 'video surveillance' means the recording of visual images of individuals, without the consent of one of such individuals, by television, motion picture, videotape or other similar method, in a location not readily observable from a public location and under circumstances in which there is a reasonable expectation of privacy." (17)

The Police Commission is of the view that this wording could be criticized as being vague. The test of any legislation is its ability to withstand challenges to its language. The Police Commission feels that the Kastenmeier wording falls short of such a test. Instead, the following wording is proposed as a guide to assist the drafters of legislation:

(a) That it should be an offence to view, monitor or record any person by means of a video camera or video device in either of the following situations:

  (i) Under circumstances in which it is necessary to trespass in or upon private property for the purpose of using or installing such a video camera or video device, or

  (ii) Under circumstances in which the person whose activities are being viewed, monitored or recorded has a reasonable expectation that his activities would not be readily observable by third parties.

(b) The legislation should state that no reasonable expectation exists where:

(i) the activities in question are capable of being readily observed from a public location, or

(ii) the activities in question are being carried on in a public place, or

(iii) the activities in question would be readily observable by third parties from a location other than the place or premise in which the activity is occurring.

(c) The words "readily observable" should mean that which can be observed by the unaided eye or by the eye aided only by normal corrective lenses.

(d) It should not be an offence to view, monitor or record by means of a video camera or video device the activities of any person being carried on in a public place.

(e) In this scheme, a "public place" would include any place to which the public has access as of right or by invitation express or implied but would not include a washroom, changeroom or other similar facility. (18)

(f) In this scheme, the words "public location" would have the same meaning as the words "public place".

(g) At least the first two exceptions contained in s. 178.11(2) of the Criminal Code should also be exceptions to legislation creating an offence of intrusive video surveillance. In other words, an exception dependent upon prior authorization as well as an exception involving consent of one of the parties under surveillance should be written into the legislation. (19)

(h) A system of prior authorization by a superior court judge should be set up to govern those situations where the police seek to conduct intrusive video surveillance

of a private setting. (20)

(i) Emergency authorization provisions should be legislated permitting applications to be made in writing or by telephone or other means of telecommunication. (21)

(j) In cases involving the offences of kidnapping (s. 247(1)) or hostage-taking (s. 247.1(1)) it should be deemed that the victim of the offence has consented to video surveillance used by the police in the course of dealing with the situation. (22)

(k) Video surveillance should not be permitted in the investigation of an offence under s. 195(1) of the Criminal Code. (23)

(l) Consideration should be given to limiting the nature, and types of offence for which intrusive video surveillance may be authorized. (24)

(m) Consideration should be given to including a minimization clause to limit the intrusive video surveillance as much as possible to the targeted activities. (25)

(n) Videorecorded evidence obtained unlawfully should be inadmissible as evidence in the same manner that private communications are inadmissible as evidence when unlawfully obtained pursuant to s. 178.16 of the Criminal Code. (26)

(o) Surreptitious video surveillance that invades privacy should only be employed when less intrusive investigative techniques (including the interception of private communications) have been tried and have failed, are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the

investigation of the offence using only other investigative procedures. (27)

(p) Clauses similar to s. 178.22 ("annual report") and 178.23 ("written notification to be given") of the Criminal Code should be equally applicable to situations involving video surveillance.

(q) Legislation governing video surveillance of private acts should have a clause permitting an aggrieved person to make application to a superior court for destruction or erasure of any videotape or record involving the person so aggrieved. (28)

The foregoing is not intended to be an exhaustive list of requirements for federal legislation in the area of video surveillance but reflects the Police Commission's views as to some matters that should be given consideration when legislation is drafted.

In recommending that Part IV.1 of the Criminal Code is an appropriate model or framework for legislation governing intrusive video surveillance, the Police Commission draws attention to the fact that the provisions of Part IV.1 have withstood the test of time. Indeed, one of the most comprehensive assaults ever launched against the constitutionality of Part IV.1 was in the recent case of R. v. Finlay and Grellette. (29) In that case, the Ontario Court of Appeal upheld the constitutionality of Part IV.1 finding support in the aspect of judicial discretion that pervades those sections. Moreover, certain of the comments of Martin, J.A. have significant bearing on the concept of reasonableness contained in s. 8 of the Charter:

> "Thus it appears to me that the prerequisite that the judge must be satisfied that it would be in the best interests of the administration of

> justice to grant the authorization, in the context of the legislative scheme, imports as a minimum requirement that the authorizing judge must be satisfied that there are reasonable grounds to believe that a particular offence or a conspiracy, attempt or incitement to commit it has been or is being committed." (30)

The importance of these words cannot be overstated. Martin, J.A. has imported the concept of reasonableness into the judicial consideration required by Section 178.13 ("the best interests of the administration of justice"). The standard contained in s. 178.13 has heretofore been one of "probable cause" (31). It would now appear that the judicial consideration required by s. 178.13 will involve not only the question of probable cause but will also require a balancing of the state's interest versus the individual's right in the light of reasonableness. Thus, situations may arise where, notwithstanding a determination of probable cause, no authorization would be granted because when weighing the state's interests against the individual's right to privacy and given the nature of the intrusion sought, it would be unreasonable to grant the authorization. (32)

Before moving to the next recommendation, mention should be made of the provisions of s. 178.14 of the Code. This section restricts the accused's access to the material filed in support of an authorization. This legislation which is aimed at protecting the confidentiality of police informers and other sources of information has proved vexing and frustrating to both counsel and the courts over the years. The problem, succinctly stated, is as follows:

> "To ascertain whether there has been fraud or wilful nondisclosure, the defence needs access to the sealed packet, but to gain access it must show fraud or wilful nondisclosure." (33)

In Working Paper 47, the Law Reform Commission has made certain recommendations with respect to s. 178.14. (34) The situation, however, has changed significantly since the publication of Working Paper 47. In R. v. Finlay and Grellette, Martin, J.A. commented that the restrictive manner in which the courts have interpreted Section 178.14 might well be "relevant to the issue of whether the accused in a particular case has been denied a fair trial, secured by s. 7 of the Charter..." (35) The effect of this obiter dicta has been significant. A number of cases have since held that to restrict an accused person's access to the information leading to an authorization would be to deny the accused a fair trial and thus infringe the rights conferred by s. 7. (36) In a recent case, Rowles, Co. Ct. J. stated:

> "In my view it is inconsistent with Section 7 of the Charter to deny the accused the opportunity to test the admissibility of evidence which may be used against him at trial, which evidence may lead to his conviction and loss of his liberty.
>
> Confidentiality of some of the material, such as the identity of informers, may be preserved through judicial editing, which is what I propose to do." (37)

The clear trend that has been established is one where the courts will now permit an accused person to have access to the information leading to the authorization virtually as of right. (38)

II. That regulations be made pursuant to s. 56 of the Police Act, R.S.B.C. 1979 C. 331 setting guidelines governing the use of video equipment by police forces in British Columbia, including a provision for an annual report to the Attorney General by the Police Commission respecting the compliance of police forces with these guidelines.

These guidelines are aimed at implementing a series of internal controls for all video use by the police

and a means of reviewing the efficacy of these controls by an independent body.

Although numerous police forces in British Columbia use video equipment, only one, the R.C.M.P., has written guidelines in place. The prominent features of these guidelines are:

(i) The authority to determine whether or not video equipment will be used in a particular investigation is vested in either the commanding officer or a designated officer.

(ii) The use of video equipment for surveillance purposes involving offences listed in s. 178.1 of the Code is subject to the approval or authorization of a designated officer but if the surveillance is to be conducted with respect to an offence not listed in s. 178.1, the approval of the Commanding Officer is required.

(iii) Video surveillance that requires surreptitious entry to be put into effect is only permitted after a legal opinion has been obtained respecting the proposed manner of entry.

(iv) Limits are placed on the duration of video surveillance.

(v) No video surveillance respecting an offence under s. 195(1) "procuring" is permitted where the surveillance would involve viewing subjects within a dwelling house, motel or similar place.

(vi) A senior R.C.M.P. officer sets the conditions as to the method in which a video camera is to be used in situations involving invasion of privacy. Included in these conditions is a requirement that the video camera only be activated when a known suspect is present, thus minimizing the intrusiveness. The R.C.M.P. regard video surveillance of private settings as being man-power intensive.

The Police Commission recognizes that the R.C.M.P.

have taken considerable steps to control the use of video equipment by its force. This effort has not been duplicated by the other police forces in the province, although some have unwritten rules which tend to vest authority in the Chief of Police, Deputy Chief or Inspector. (39)

The Police Commission regards it as essential that guidelines respecting video use by police forces in British Columbia be standardized and subject to a form of external control. The Police Act is a suitable legislative vehicle for this exercise in that s. 56 permits the Lieutenant Governor in Council to make regulations governing police conduct in the province. (40)

The Police Commission recommends that the following regulations be put in place to govern police use of video equipment:

(1) Each police force shall provide a central place where its video equipment shall be kept.

(2) All use of video equipment by members of a police force shall be under the direct control of the Chief Constable or his designate.

(3) A log or record (41) shall be kept of all use of video equipment which shall contain:

(a) the time and date the video equipment is signed out;

(b) the specific type of video equipment that is signed out;

(c) the time and date the video equipment is returned;

(d) the name of the police officer(s) utilizing the video equipment;

(e) a record of all matters that were viewed, monitored or recorded;

(f) a record of the location where the viewing, monitoring or recording took place;

(g) names of all police officers involved in the viewing, monitoring or recording;

(h) names of all known subjects viewed, monitored or recorded;

(i) the number of tapes used and the number of copies made and the location where kept;

(j) the nature of the offence under investigation;

(k) the nature of the installation, including a statement as to whether surreptitious entry was required to effect the installation;

(l) if surreptitious entry was required to install the video equipment, a statement as to the means utilized to gain access to the premises in question;

(m) the duration of the installation and the manner of filming, including the type of lens(es) utilized;

(n) a statement as to whether the video viewing, monitoring or recording was accompanied by audio;

(o) if a videotape or videorecord has been erased or destroyed, a notation as to when this was done and by whom.

(4) Regulations should provide for any police officer who will be using video equipment to be trained in its use.

(5) Intrusive video surveillance should only be permitted for offences listed in s. 178.1 C.C.C. Reports shall be submitted to the Chief Constable or his designate every seven days and included in such reports shall be the information set forth in paragraphs 3(e) through (n) above.

(6) In circumstances of intrusive video surveillance, "live-monitoring" should be required. This requirement would mean that the cameras, once installed, would be constantly operated by a police officer viewing the scene in order to turn the camera off or cease recording when persons not targeted in the investigation were present in the absence of a suspect or suspects.

(7) The records of every police department regarding video use shall be subject to audit by the Police Commission.

(8) A report by the Police Commission respecting the material contained in the aforementioned records shall be submitted annually to the Attorney General.

The purpose of these regulations is to provide a system of accountability and control under the direct supervision of the Chief Constable. A breach of these regulations would be a matter for internal discipline.

The Police Commission emphasizes that these regulations are not simply a stopgap measure. Unlike the technology and skill required to effect an audio interception, particularly a wiretap, the video camera is highly mobile and easily operated. As well, police officers have privileges and access to locations and places unavailable to ordinary members of the public. Internal controls achieve an importance when viewed in this light and such controls are a useful first measure. However, it must be emphasized that ultimate control will depend on federal legislation.

III. That a project involving videorecording of police interviews of suspects in cases of major crime be carried out by a British Columbia police force.

This recommendation is prompted by the Halton Project. (42) It appears from the Halton study that videotaping of police interviews of suspects in criminal cases has significant benefits for the criminal justice system, including the cost benefit of saving court time, the accuracy and reliability of the videorecorded interview and an increased initiative by police officers conducting the interviews. Based on the significant results achieved by the Halton Project, it would seem timely that a similar project in British Columbia be launched.

CONCLUSION

The foregoing recommendations have been aimed at striking a balance between individual rights and legitimate governmental objectives. To this end, the Police Commission has attempted to be responsive to the feelings and demands of the informed public.

In a society where technology is so highly developed and the gathering and cataloging of information so pervasive that anonymity is a thing of the past, the household, apartment and hotel room have become the last bastions of privacy. In this setting, intrusive video surveillance should be a last resort technique subject to strict controls and only employed in circumstances of the utmost necessity.

The Police Commission is well aware that to legitimize police invasion of privacy has the hazards of opening a Pandora's box. However, these hazards can be avoided if the legislation is sufficiently restrictive. The

Police Commission believes that restrictive legislation is better than no legislation at all.

Footnotes

1. Stanley Cohen, Invasion of Privacy: Police and Electronic Surveillance in Canada, 1983, Carswell, at p. 33.

2. Anyone who doubts this proposition should review the Supreme Court's decisions in Ref. re s. 94(2) of Motor Vehicle Act, R.S.B.C. 1979 c. 288 (1986) 48 C.R. (3d) 289 and The Queen v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295.

3. Hunter v. Southam [1984] S.C.R. 145.

4. Ref. re s. 94(2), supra footnote 2; However, in R. v. Rowbotham, 1985, 42 C.R. (3d) 164, Ewaschuk, J. rejected the argument that s. 7 creates a right to privacy (p. 174). It should be noted that His Lordship doubted that a separate right to privacy existed in the Charter at all.

5. Supra footnote 3 at pp. 159-160.

6. Ibid.

7. Ibid at p. 160.

8. Ibid at p. 161.

9. Ibid at p. 161.

10. Ibid at p. 162.

11. Although in its landmark decision on s. 24(2) of the Charter in R. v. Therens [1985] 1 S.C.R. 613 the judgments were structured in such a fashion as to leave it unclear as to how the lower courts should apply the exclusionary provisions, the Supreme Court has now given bold direction to the courts in the recent case of Clarkson v. R. (1986) 50 C.R. (3d) 289.

12. In gathering material for this report, the Police Commission met with or contacted all police forces operating in British Columbia. A number of senior police officials expressed the view that legislation to govern video surveillance was inevitable and that looking with hindsight at the wiretap provisions of the Code, it could be safely stated that these sections had greatly enhanced law enforcement capabilities.

13. Law Reform Commission of Canada, "Working Paper

47: Electronic Surveillance", 1986.

14. 99th Congress, 1st Session, H.R. 3455, "A Bill to amend Title XVIII, United States Code, to prohibit certain forms of video surveillance, and to modify certain prohibitions with respect to other surveillance", introduced September 30, 1985 in the House of Representatives by Mr. Kastenmeier. The Police Commission has learned that this Bill "died" without any hearings and without any Senate interest. Further information indicates that this is not uncommon and it is expected that this Bill or one very similar to it will be introduced at a subsequent session.

15. Supra footnote 13 at p. 22.

16. Ibid.

17. Supra footnote 14.

18. By specifically excluding places such as washrooms, changerooms and other similar facilities, the Commission is seeking to avoid the unhappy consequences attending a situation such as occurred in the case of R. v. Lofthouse, unreported reasons for judgment of McNeely, J. of the Ontario District Court, March, 1986. There, the police mounted a video camera in a men's public washroom capable of viewing activities performed in the cubicles. The trial judge held that such video recording amounted to an infringement of the accused's s. 8 right to privacy but declined to invoke the provisions of s. 24(2) of the Charter to exclude the evidence. The accused was convicted and subsequently appealed to the Ontario Court of Appeal. The matter is scheduled to be heard in January, 1987.

19. An exception based on the consent of one of the parties subject to the video surveillance is a troubling one. In its Working Paper on Electronic Surveillance, supra footnote 13, the Law Reform Commission considered the consent provisions contained in Part IV.1 of the Code. After reviewing a number of proposals, the Law Reform Commission stated: "We believe that neither proposal is acceptable, and that the law must be maintained essentially as it is now." (supra footnote 13 at p. 27) There are, however, significant differences between the interception of private communications and a case involving intrusive video surveillance. Video surveillance creates a continuous and all-encompassing visual

record of the activity being recorded. Audio interceptions, on the other hand, are limited to periods of communication. It may be that with an implied consent provision to cover situations involving kidnapping or hostage-taking and with adequate emergency authorization provisions, a consent provision in legislation governing video surveillance would not be necessary.

20. Prior authorization in the video surveillance scheme should be expressed in terms of reasonable and probable grounds, particularly in light of Dickson, C.J.'s remarks in Hunter v. Southam, supra footnote 3 at p. 168.

21. The Police Commission acknowledges that in making this recommendation, it has borrowed heavily from the Law Reform Commission's recommendations with respect to the Part IV.1 emergency authorization provisions contained in s. 178.15 of the Criminal Code, supra footnote 14 at pp. 65-66. The importance of the emergency authorization cannot be overstated, particularly in cases involving kidnapping, hostage-taking or undercover police work where drug buys or other illicit meetings are scheduled on short notice and the protection of the undercover police officer is a concern.

22. The Law Reform Commission considered a similar proposition covering situations involving audio interceptions, supra footnote 13 at pages 65 - 66:

> "It was suggested that such interceptions could be rendered lawful by deeming the victim of the offence to have consented to any interception. On the whole, it is not clear to us that this would advance the situation, since it is unlikely that the victim would be party to many conversations. Interception of communications to the person who is the victim of extortion would already be lawful, if done with the actual consent of that person."

This passage illustrates the difference between audio interceptions and video surveillance. Kidnappings and hostage-takings are emergent situations. The latter offence often takes place in the prison setting. (A classic example of such an incident was the 1975 hostage-taking at the B.C. Penitentiary, resulting in the death of Mary Steinhauser.) Such incidents require quick and effective police response. Visual surveillance of the hostage and his captors is obviously a great

benefit to police in these situations but often can only be achieved by utilizing such means as the video camera, particularly where the hostage-takers have secured themselves with their captive in an enclosed space. In such circumstances, the police have equipment available to quickly establish video surveillance of the scene. A deemed consent provision in these circumstances makes eminent sense.

23. It is significant to note that an offence under s. 195(1)(a), "procuring", ceased to be an offence for which an authorization under Part IV.1 could be obtained as of November, 1985. (1985, c. 19, s. 7(2)) Moreover, the Law Reform Commission, in Recommendation #1 of Working Paper 47, (supra footnote 14) recommended that s. 195(1)(a) be deleted from the offences listed in s. 178.1 of the Code. The problem with permitting video surveillance with respect to an offence under s. 195(1)(a) is precisely the problem that arose in the "Top Hat" case (R. v. Blakely, Victoria Co. Crt., November, 1985). The difficulty arises because the courts have held that in order to prove an offence under this section, the Crown must show that sexual intercourse actually took place. R. v. Deutsch (1983) 5 C.C.C. (3d) 41.

24. A common theme in the representations received by the Police Commission was that visual interception of acts performed by persons in private amounted to a qualitatively more intrusive invasion of privacy than did the interception of private communications. Moreover, in Working Paper 47 (supra footnote 13 at p. 9), the Law Reform Commission, in commenting on the case of Hunter v. Southam, stated as follows: "Further, the Court requires that the assessment of the competing interests be on a sliding scale depending on the type of intrusion and the state interest involved."

At least one author has suggested that video surveillance should not be permitted where it involves an intrusion upon personal privacy: See David P. Hodges, "Electronic Visual Surveillance and the Fourth Amendment: The Arrival of Big Brother?" [1976] Vol. 3, Hastings Constitutional Law Quarterly, 261 at p. 296. Mr. Hodges' views were largely based on the assumption that there were no situations where other investigative techniques such as search warrants and interception of private communications would not suffice. With respect, the Police Commission

regards that approach as unimaginative. The case of U.S. v. Torres 751 F. (2d) 875 (1984) provides an excellent example of a situation where other investigative techniques would be of little use (wiretapping) or exceedingly dangerous (execution of a search warrant).

25. The concept of minimization has been a frequent topic of discussion with respect to the Part IV.1 provisions of the Code for many years. Unlike Title III, the Part IV.1 provisions of the Code do not have a minimization requirement. The Police Commission has reviewed the comments of the Law Reform Commission respecting minimization in Working Paper 47. Supra footnote 13 at pp. 34-38. Because of the qualitative difference between the interception of private communications and the surreptitious video surveillance, the Police Commission is of the view that in those situations where intrusive video surveillance is permitted, minimization should be a requirement. It is acknowledged that this would likely mean increased costs in terms of manpower but this is a concession the police will have to make when having resort to this most intrusive form of surveillance to ensure that persons engaged in activities that are not the subject of the video surveillance do not have their activities subject to viewing and recording. The Law Reform Commission has pointed out the dangers inherent in the unmonitored interception of private communications and the same is all the more obvious in the case of video surveillance:

> "The authorization in operation acts like a huge electronic vacuumcleaner, indiscriminately sucking in the relevant with the irrelevant without distinction." (supra footnote 13 at p. 34).

26. The Police Commission has reviewed the Law Reform Commission's recommendations with respect to s. 178.16 ("Intercepted Private Communication Admissibility"), supra footnote 14 at pp. 67-89. The Police Commission is of the view that as surreptitious video surveillance that invades privacy will necessarily involve a breach of s. 8 of the Charter, the standards for exclusion of evidence set by the Supreme Court of Canada with respect to s. 24(2) of the Charter would tend to govern situations involving the admissibility of videorecorded evidence that was obtained unlawfully.

27. As surreptitious video surveillance is the most intrusive surveillance technique available to police, it is only logical that it be a last resort technique. In other words, intrusive video surveillance should only be resorted to when necessity demands it.

28. Many of the persons and groups who met with the Police Commission expressed a concern with the manner in which videorecordings obtained by police in circumstances of surreptitious surveillance that invaded privacy would be kept and what would happen to the material once an investigation was concluded. The Police Commission recognizes the potential harm that could be caused if videotapes of individuals engaged in illicit activity were circulated or fell into the wrong hands. On the other hand, the Police Commission recognizes the need for police forces to maintain records of criminal activity, particularly in circumstances of ongoing investigations. It is clear that some types of criminal activity, once videorecorded and having been used as evidence in the course of a prosecution, would be of little value to the police at the conclusion of the proceedings. On the other hand, it is easy to envision situations where such videorecorded material would have further use. These competing interests would be partially resolved by a notification provision similar to s. 178.23 of the Code. This provision allows written notification to a person whose communications have been intercepted to be delayed for up to three years following the period for which the authorization was renewed. A similar notification provision governing video surveillance would tend to satisfy police investigative requirements.

29. (1986) 48 C.R. (3d) 341. Leave to appeal to the Supreme Court of Canada was subsequently refused.

30. Ibid at pp. 364-5.

31. David Watt, Law of Electronic Surveillance in Canada, 1979, Carswell: "The elements of probable cause established by the other requirements of s. 78.12(c) to (f), inclusive, presumably establish the evidentiary basis upon which the initial finding of s. 178.13(1)(a) is to be made." (at p. 111).

32. Stanley Cohen, (op. cit. footnote 1), was particularly prophetic when he stated at pp. 136-137: "It should also be noted that these proposals

assume that there resides in the authorizing judge a discretion to modify or refuse the application. The mere filing of appropriate documents does not of itself determine the matter. It is to be expected that there 'will be situations where a technically adequate showing of probable cause might be made out yet where a concrete balancing of the interests of privacy and justice might indicate that surveillance should not be authorized.'"

33. Supra footnote 13 at p. 60.

34. Ibid at pp. 64-65, Recommendations 48-51.

35. Supra footnote 29 at p. 372.

36. See for example, R. v. Martel (1986) 51 C.R. (3d) 282, and R. v. Wood (1986) 54 O.R. (2d) 681.

37. R. v. Young et al, unreported reasons for judgment of Rowles, Co.Ct.J., Vancouver County Court, May 21, 1986 at p. 12.

38. In Working Paper 47, supra footnote 13, the Law Reform Commission in referring to s. 178.14 of the Code, stated at page 62:

> "It was therefore proposed that we adopt a procedure whereby the accused would be given complete access to the material used on the application, as is done in the United States. The viability of this procedure was presented to our consultants and there was almost complete agreement that, subject to a method to protect the identity of informers and persons assisting the police, there was no reason not to give the defence complete disclosure."

The Police Commission is of the view that as a result of the words of Martin, J. A. in R. v. Finlay and Grellette, supra footnote 29, the above-noted conclusion of the Law Reform Commission is now in practical effect and it may well be time for s. 178.14 to be amended to embrace the concept of disclosure coupled with an adequate means of editing to protect the identity of informers. Without such legislation in place, the matter of editing will not be carried out in a uniform fashion.

39. The Coordinated Law Enforcement Unit (C.L.E.U.) vests authority for video use in the Chief Inspector. The Victoria Police Department vests authority in the Chief Constable or a Superintendent. Similar rules apply for the West Vancouver Police, New Westminster Police and Matsqui Police.

40. The Commission is greatly indebted to Robert Edwards, Q.C. of the Ministry of the Attorney General and Clifford Watt of Legislative Council for their assistance in reviewing the practicality and constitutionality of regulations pursuant to the Police Act, R.S.B.C. 1979, c. 331. After discussions with Messrs. Edwards and Watt, the Police Commission is of the view that regulations can properly be made pursuant to either s. 56(a) "government of police forces" or s. 56(1) of the Police Act.

41. If federal legislation is enacted, any log or record required to be kept by police forces in British Columbia should contain an entry as to whether a court authorization was required for the specific use of the video equipment in question.

42. Professor Alan Grant, "The Audio-Visual Taping of Police Interviews with Suspects and Accused Persons by Halton Regional Police Force, Ontario, Canada; An Evaluation", prepared for the Law Reform Commission of Canada. First Interim Report December 31, 1985; Second Interim Report (cumulative) June 30, 1986. The results of these two reports have clearly shown great benefits to the criminal justice system arising from the video-recording of suspects when being questioned by the police.

CHAPTER 10

COMMENTS

"Ensuring that personal privacy is only interfered with when some greater and overriding utility is obtained is a matter of considerable public interest. Our legislators have a great responsibility to define those circumstances carefully and precisely, lest the abuse of discretion undermine much of what we as a community hold dear."

B.C. Civil Liberties Association submission to the Police Commission June 24th, 1986.

This study has concentrated on the police use of video equipment in circumstances involving an invasion of privacy with a view to ascertaining the limits that should be placed on this most intrusive method of investigation. The fact that there are presently no legislative controls in place to govern such activity bears repeating. The police use of the video camera today is legislatively unfettered. That this presents a very real problem is an understatement. The events surrounding the "Top Hat" case are forceful testimony to this. As one author has stated:

> "I can think of few issues more important to a society than the amount of power that it permits its police to use without effective control by law". (1)

In its effort to determine what controls are appropriate, the Police Commission has kept the Attorney General's terms of reference firmly in mind. Thus, to a very great extent this study has involved a quest for that elusive point where the balance is to be struck between the individual's right to privacy and the government's need to enforce the law. A similar task was faced by the drafters of Part IV.1 of the Criminal Code. The difference is that the ground has now shifted. The drafters of Part IV.1 did not have the Charter of Rights and Freedoms as a backdrop

for their deliberations.

In the case of video surveillance, where does the balance lie between the individual's right to privacy and the government's need to enforce the law? The answer has to be that the scales tilt strongly in favour of the individual's right to privacy. This is not to say that intrusive video surveillance by the police in investigating crime should never be permitted. As long as crime exists, those determined to break the law will employ the most advanced and sophisticated measures available to commit the breach and avoid detection. Should the police be hampered in investigating these crimes by not having access to the same technology? The anwer is surely no. This is not to say that the police should have unrestricted use of video technology for intrusive surveillance. The point simply stated is that effective controls must be put in place to ensure that the scales only tilt in favour of law enforcement concerns when necessity demands. In each case, this will involve close scrutiny of a number of variables by an independent arbiter. This will never be an easy task. "In the pans of judgment sit imponderable weights." (2)

In fulfilling its obligations in this study, the Police Commission has not simply emphasized the need for legislation to control video surveillance but has also attempted to formulate the nature and extent of these controls. Let there be no doubt that legislation is needed and needed soon:

> "...there is a strong case to be made for the position that wherever police activity is by nature intrusive it should be highly regulated..." (3)

The legislation proposed by the Police Commission is on two fronts, federal and provincial. Both are necessary, although it can safely be said that without federal

legislation, the safeguards created by the provincial legislation will be inadequate. (4)

THE PROPOSED FEDERAL LEGISLATION

The federal legislation proposed by the Police Commission has numerous components, three of which require further discussion:

(1) A system of prior authorization.

(2) That consideration be given to limiting the nature and type of offence for which intrusive video surveillance may be authorized.

(3) A requirement that surreptitious video surveillance that involves an invasion of privacy should only be employed when less intrusive techniques (including the interception of private communications) have been tried and have failed, are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

As for the first of these considerations, the Police Commission acknowledges numerous representations by members of the judiciary and others that consideration should be given to imposing the responsibility for granting a prior authorization on a person other than a superior court judge. Some judges regard it as offensive and outside the realm of their responsibilities to be required to determine ex parte applications for wiretap authorizations under Part IV.1. The Police Commission gave consideration to this concern but has concluded that for the present, the granting of a prior authorization in the case of video surveillance must be vested in a superior court judge. The reasons for this are twofold:

(1) The machinery and custom have now been in place since the enactment of Part IV.1 of the Code over a decade. In other words, the judges have the knowledge and experience to deal with applications

for authorizations. Moreover, it would be inconsistent to have superior court judges dealing with authorizations for wiretap but not with authorizations for the more intrusive method of video surveillance.

(2) To shift the responsibility for granting prior authorizations to a person other than a superior court judge would involve the creation of a group of "privacy commissioners" or similar body, which would be an extremely expensive and cumbersome proposition. In the case of wiretap authorizations, superior court judges are presently available on a province-wide basis to deal with applications as they arise. How many privacy commissioners would be required to duplicate this task?

In short, although sympathetic to the views and concerns of those judges uncomfortable with the present authorization provisions of Part IV.1, the Police Commission sees no realistic alternative to a similar proposition in the case of authorizations for video surveillance.

The second consideration, that of limiting the offences for which intrusive video surveillance would be permitted, represents a potentially significant check on this investigative technique.

In its recent working paper on electronic surveillance, the Law Reform Commission of Canada reviewed the provisions of s. 178.1 of the Code which lists the offences for which an authorization to intercept private communications can be granted. The Law Reform Commission's concluding remarks were these:

> "We recommend relatively minor changes to the present list of offences for which an authorization may be obtained." (5)

As video surveillance is significantly more intrusive than the interception of private communications, the answer is not so simple. However, to arrive at a ready formula to determine which offences should be subject to

surreptitious video surveillance and which should not, is a difficult task. One recommendation has been to impose prohibitions on intrusive video surveillance for offences punishable by less than ten years imprisonment. (6) The problem with this recommendation is that there are numerous offences punishable by less than ten years imprisonment which logically lend themselves to detection by video surveillance. The offence of possession of explosives (s. 80 C.C.C.) is an excellent example of an offence which could lend itself to investigation by video surveillance. (7) Yet, this offence is only punishable by a maximum of five years imprisonment. A blanket proscription restricting intrusive video surveillance to offences punishable by ten years or more imprisonment would fail to embrace this particular offence.

On the other hand, there are offences punishable by ten years or more imprisonment which do not at first glance appear to be ready candidates for detection by video surveillance. For example, it is difficult to conceive of a situation in which it would be helpful to employ the video camera to investigate an allegation of sexual assault. It is the exception, however, that always proves the rule and the U.S. case of People v. Teicher (8) is an excellent example of this.

To consider the nature and type of offence for which video authorizations should be granted is a perplexing problem but it can be stated with certainty that there are certain offences for which such surveillance should not be permitted as the "Top Hat" case has so glaringly demonstrated.

The third check on intrusive video surveillance is the imposition of a requirement that other investigative techniques, including wiretap, have been tried and failed or

are unlikely to succeed or where the urgency of the matter is such that an authorization should be granted. Requiring intrusive video surveillance to be a last resort investigative technique will have the effect of reducing the situations in which it would be authorized. This requirement represents a "step-up" approach to authorizations. The more intrusive the investigative technique, the more restrictions will be placed on its use, including the requirement of exhausting other methods of investigation. The natural tendency of this requirement will be to confine those situations where video surveillance would be permitted.

THE PROPOSED PROVINCIAL LEGISLATION

The provincial legislation recommended in this report is directed at creating a detailed structure of controls for internal use by police forces when using video equipment. The focus of these recommendations is on accountability achieved by centralizing the decision-making authority and by subjecting police department records to audit by the Police Commission.

The Police Commission considered provincial legislation of a broader scope but felt that such legislation might well lead to constitutional challenges based on the division of powers between the federal and provincial governments. If the provincial government is to legislate in the area of video surveillance, it is important that it confine itself to its own domain. It would be convenient if the province could legislate widely in the area of privacy in order to control the use of the video camera by making it an offence to carry out intrusive video surveillance but this would be to legislate in the area of criminal law which, as Professor Hogg has pointed out, is not within the province's sphere of legislative competence:

> "In all the decisions in which provincial laws were upheld, the penalties were imposed in respect of matters over which the provinces ordinarily have legislative jurisdiction, such as property, streets, parks, corporate securities. This was an essential element of the decisions, because s. 92(15) confers a power that is merely ancillary to other provincial heads of power. Where...the provincial offence cannot be safely anchored in property and civil rights or some other head of provincial power, then it will be invalid." (9)

Seen in this light, the safest course is to adopt a conservative stance and recommend only legislation that is clearly within the legislative competence of the provincial government.

During the course of this study, the Police Commission considered the matter of those involved in the private security sector. Private investigators routinely use the video camera in order to gather evidence for clients engaged in civil and family litigation. This is particularly true with respect to personal injury litigation where investigators frequently videorecord the activities of plaintiffs in an effort to obtain evidence demonstrating that the individual is capable of physical movements and actions where disability and loss of movement is claimed. These videorecordings are often obtained by surveillance carried out at or near the residence of the plaintiff. Such surveillance can be at the very edge of invading personal privacy. Moreover, the private investigators represent a significantly large group regularly engaged in video surveillance. (10)

Having considered this matter, the Police Commission is of the view that where a private investigator might be inclined to overstep the bounds of legitimate surveillance and intrude on individual privacy, he would be subject to the provisions of s. 14 of the Private Investigators and Security Agencies Act (11) which provides

for suspension or cancellation of an investigator's licence in certain circumstances. These provisions give the Registrar broad powers to deal with the conduct of private investigators. This being so, the Police Commission has no recommendations in this area.

CONCLUSION

At the commencement of this study, the Police Commission set out to determine what video technology was available for surveillance purposes. The lesson derived from this exercise was that technology is available which has the potential to effectively sweep away the ability of an individual to conduct his affairs in private. When one considers the rapidly increasing use of video equipment by police forces, the prospects for potential harm become disturbing.

In a society that prides itself on the rights and freedoms that it has conferred on its citizens and emphasizes the need for individuality, the notion of unregulated video surveillance by the police is repugnant.

The experience of the "Top Hat" case was a hard lesson. The lesson should not be wasted.

Footnotes

1. Anthony G. Amsterdam, "Perspectives on the Fourth Amendment", in "Minnesota Law Review" 1974, Vol. 58, p. 349 at p. 377.

2. Ibid at p. 354.

3. Stanley A. Cohen, Invasion of Privacy: Police and Electronic Surveillance in Canada, Carswell, 1983 at p. 47.

4. For one thing, the R.C.M.P. would not appear to be subject to provincial legislation as they are a federal police force under contract to the Province of British Columbia pursuant to s. 16 of the Police Act, R.S.B.C. 1979, c. 331. In this regard, they are not subject to the present audit provisions of the Police Act. For a general discussion of this topic, see Peter W. Hogg, Constitutional Law of Canada, 2nd ed., 1985, Carswell at pp. 426-430 and particularly, at p. 428 where the author states:

> "The cumulative result...for the administration and management of the force and...for the discipline of the force is a substantial limitation of provincial power over the R.C.M.P. It is clear that the eight provinces that choose to rent the services of the R.C.M.P. have thereby forfeited a great deal of the control that a province could exercise over a provincial police force.

5. Law Reform Commission of Canada, "Working Paper 47: Electronic Surveillance", 1986 at p. 16.

6. "A Bill to amend title 18, United States Code, to prohibit certain forms of video surveillance, and to modify certain prohibitions with respect to other surveillance", 99th Congress, First Session, H.R. 3455, s. 3.

7. The case of U.S. v. Torres 751 F. (2d) 875 (1984) is an example of a case where video surveillance was used to great effect in obtaining evidence involving members of a radical Puerto Rican separatist group assembling bombs in a dwelling house.

8. 422 N.E. (2d) 506 (1982). In Teicher, a hidden video camera successfully recorded the actions of the accused dentist sexually assaulting female

patients under sedation in his dentist's chair.

9. Supra footnote 4 at pp. 419-420.

10. As of October, 1986, there were 129 private investigator business licences and 367 employee licences issued under the Private Investigators and Security Agencies Act, 1979 R.S.B.C. c. 336.

11. 1979 R.S.B.C. c. 336 and amendments thereto.

SUMMARY OF RECOMMENDATIONS

The Honourable Brian R. D. Smith, Q.C. requested the British Columbia Police Commission to engage in this study on January 15, 1986. At that time, the Attorney General expressed concern as to whether acceptable procedures and guidelines were in place with respect to the use of video equipment in the course of criminal investigations by police in this province. The Attorney General went on to say that he looked to the Police Commission to advise him as to what reasonable steps could be taken to balance the needs of the government in combatting crime with reasonable safeguards for the privacy and anonymity of law-abiding citizens.

The Police Commission study has determined that acceptable procedures and guidelines governing police use of video equipment are the exception. As well, the point of balance between the oft-competing interests of the government in its need to enforce the law and the citizen in maintaining his right to privacy and anonymity is ill-defined.

In an effort to address these problems by finding fair and reasonable solutions, the Police Commission has the following recommendations:

I. **That the federal government enact legislation governing intrusive video surveillance.**

Federal legislation is a sine qua non to the effective control of intrusive video surveillance. As has become apparent, the words "intrusive video surveillance" in this study refer to video surveillance that has the potential to or actually does intrude upon a person's

reasonable expectation of privacy. The division of legislative power in this country is such that it would not be competent for the provincial government to enact the type of legislation that is necessary in this area. The solution, therefore, depends upon effective federal legislation.

II. **That regulations be made pursuant to s. 56 of the Police Act, R.S.B.C. 1979 C. 331 setting guidelines governing the use of video equipment by police forces in British Columbia, including a provision for an annual report to the Attorney General by the Police Commission respecting the compliance of police forces with these guidelines.**

This is an area for useful provincial legislation. The only police force in the province that has a thorough and written set of internal guidelines governing the use of video equipment is the R.C.M.P. This is anomalous in that many of the other police forces use video equipment in the course of their investigations and all the police forces have access to the very advanced video equipment possessed by the R.C.M.P. and C.L.E.U. Moreover, the Police Commission is of the view that comprehensive internal guidelines vesting accountability in the Chief Constable or other high officer and subject to audit from time to time by the Police Commission have the inevitable result of engendering careful and thoughtful use of video equipment by the police.

III. **That a project involving videorecording of police interviews of suspects in cases of major crime be carried out by a British Columbia police force.**

The Police Commission has determined that the videorecording of interviews of suspects in a criminal investigation is one of the most beneficial aspects of the

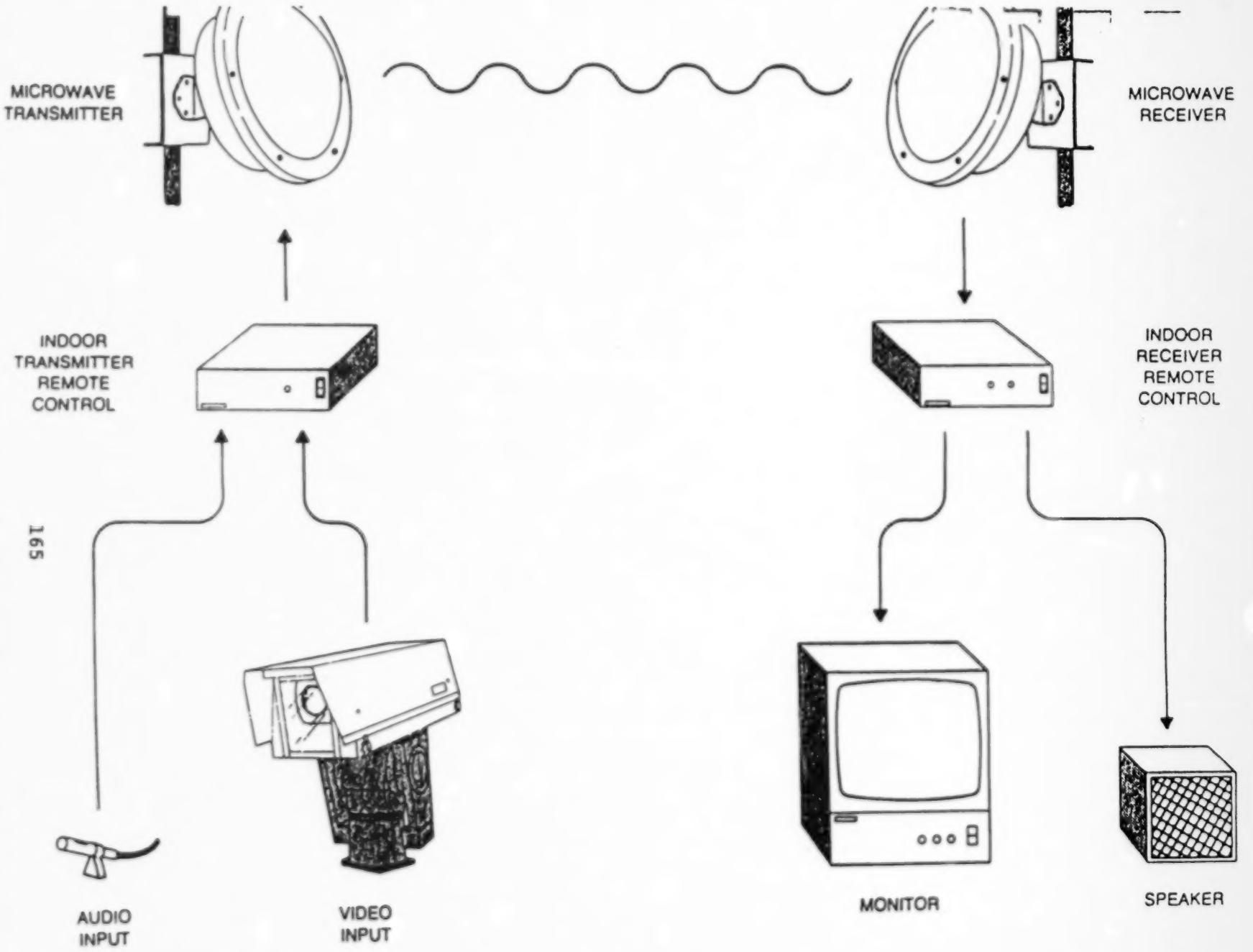
police use of the video camera. Police forces in other provinces have used the video camera for this purpose to great effect. The use of the video camera in the interrogation setting is regarded as being of value to both the police and the suspect in that it records with certainty the questioning as it took place.

These, then, are the recommendations reduced to the nub. The foundation to these recommendations is laid in the preceding chapters of this study.

In these chapters, emphasis has been placed on the Constitution Act and particularly, the Charter of Rights and Freedoms, as well as the American development of search and seizure law and Fourth Amendment protections. There are two reasons for this. Firstly, the Charter is having an enormous impact on the evolution of the law and secondly, our courts and particularly, the Supreme Court of Canada, are looking more and more to the American experience for direction in interpreting and applying the Constitution. Accordingly, to consider the matter of video surveillance and attempt to frame recommendations without a close scrutiny of these matters would make little sense.

The Police Commission thanks all who assisted in the preparation of this report.

APPENDIX "A"



Basic Microwave Transmission System

APPENDIX "B"

jai
is a leader in Low Light Level TV camera design

Through three generations of special TV cameras jai has been solving Low Light Level surveillance problems. Today's technology coupled with 21 years of experience are incorporated in the design of jai's third camera generation, 733 SIT (moonlight) and 743 ISIT (starlight).
This new LLL TV camera series, jai Nighthawk, introduces a new customer-orientated concept: **Specification Stability.**

Two former generations of LLL TV cameras have illustrated to jai the importance of supreme reliability in critical situations - moments not to be replayed, but caught in realtime.
In designing the jai Nighthawk series, the most decisive improvements have been made in vital functions. The result is the ultimate in stability and reliability ... we call it
Specification Stability.

- Sensitivity:
  SIT 2×10^{-5} lux, ISIT 2×10^{-6} lux
- Limiting resolution:
  SIT 650 lines, ISIT 570 lines
- Temperature range:
  $\div20°$ - $+50°$ C ambient
- Environmental conditions: IP 65
- Power consumption: 12 W

For further information ask for "Technical Sheet".

System Flexibility

The jai Nighthawk series is a complete LLL TV camera system. Its modular design and the extensive range of add-on products allow numerous applications, to cover exactly what you need.

Power supplies

Fixed lenses
Zoom lenses
Long range lenses
Special lenses
Integral lens housings

Camera options

Portable options

Monitors

Supporting equipment

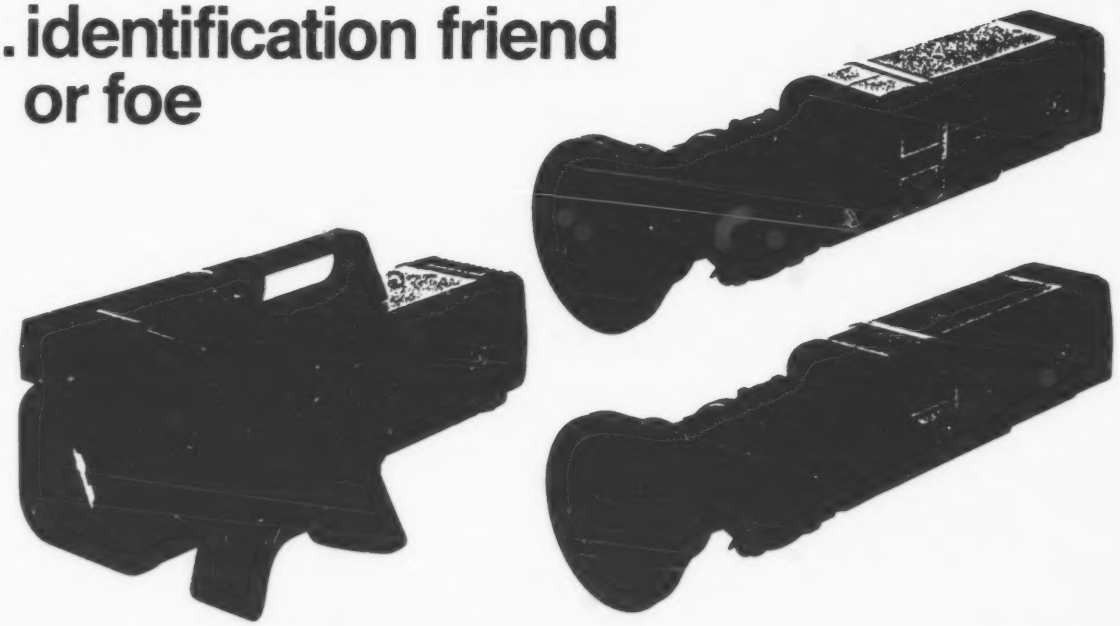
Add-on products

Special products

Control & transmission equipment

For system configuration ask for our system guide sheets.

...identification friend or foe



The most vital function of a surveillance camera is to give clear pictures for immediate identification and decision making - day after day - year after year. The jai Nighthawk series comprises the 733 SIT and 743 ISIT cameras. Constructed over a closed form the cameras are extremely rugged units in subdued colours for discreet installation. The 733 SIT (moonlight) and 743 ISIT (starlight) cameras are equipped with a number of reliable automatic circuits to provide optimal performance under all conditions: Auto black level, auto aperture, auto gain control and auto EHT voltage control.

LLL TV cameras for 24 hour operation

The jai Nighthawk cameras will give you clear pictures 24 hours a day from full sunlight down to moonlight (SIT) or starlight (ISIT). The fast reaction of the camera's electronic shutdown prevents bursts of light damaging the tube. Two seconds after a light burst, the camera will automatically return to its previous operational sensivity. This ensures a high tube MTBF resulting in very low hourly operating costs.

On location - fixed, mobile, and portable

The jai Nighthawk range of add-on products ensures you a truly flexible camera system. It is equally versatile for fixed and mobile applications, and it is used as the basis for a number of jai special products. By using the portable kit, battery belt, portable VCR or transmitter with the basic camera, fully independent operation or remote "reporting" are possible.

EHT Unit

The new jai EHT unit matches the requirements of the sensitive camera tube and ensures optimum performance and stability.

Backfocus Stability

The unique backfocus design of the jai Nighthawk series negates readjustment due to changes in temperature around the camera itself. This provides a stability many times better than other cameras. Backfocus stability is a must, when using lenses with a focal length over 150 mm.

Options

To optimise your individual requirements an extensive range of options are available.

Bright light limiter
Gamma selector
Shading corrector
Circular blanking
Mains lock/genlock
Video mixer
Balanced output
Video inverter

Designed as daughter boards all options can be user mounted and adjusted. jai Nighthawk cameras can therefore be easily upgraded and new options be designed to meet user requirements.

Service Improvements

Service time for the jai Nighthawk series can be minimized by using jai's new Service Unit (SU). The SU interfaces diagnostically with the camera to allow fault analysis and readjustment in the shortest possible time.

Double Warranty Period

As a natural consequence of the Nighthawk series' ultimate reliability, the jai warranty*) period has been doubled to two years.

*) According to standard jai warranty terms

APPENDIX "C"

MITSUBISHI VIDEO PRINTER

PacifiCom
Pacific Communications Ltd.

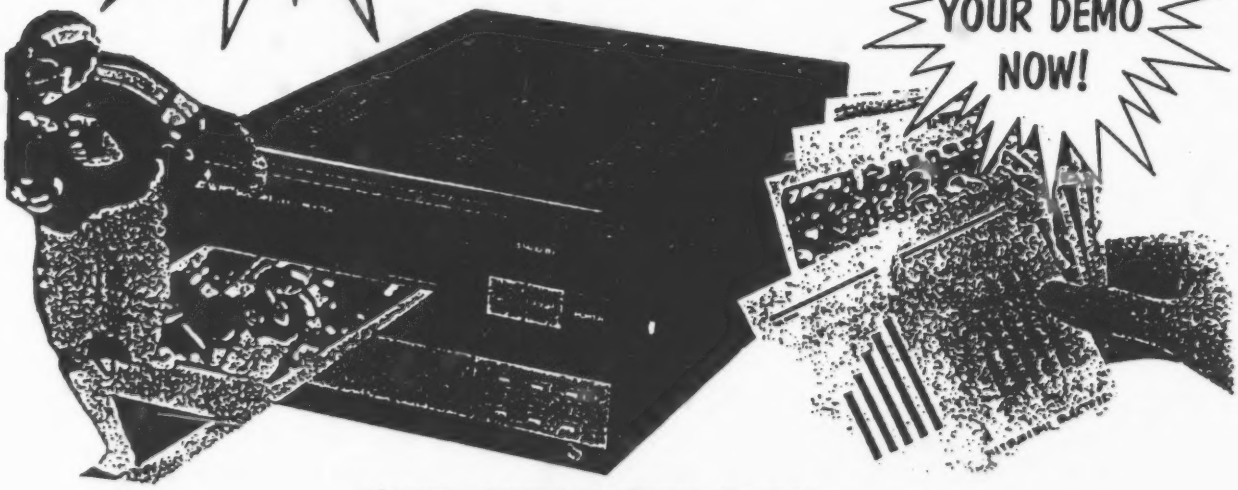
DATE: *March 1985*

FROM: *Video Sales Dept.*

MODEL: *P-50C*

CAT. SECTION: *CCTV*

ARRANGE YOUR DEMO NOW!



HARD COPY PRINTS FROM ANY VIDEO SOURCE

FEATURES

- *Instant response push a button, & the picture on your screen is instantly stored & printed*
- *Fast Printing 15 Seconds*
- *Good Image Quality 280 Dots x 234 Dots*
- *Each Dot capable of 16 discrete tones from black to white*
- *Wired Remote control*

- *Useful size 8.4 x 10 cm 3⅜" x 4"*
- *Low Cost Prints under 5 cents per print*
- *Any number of identical copies*
- *Negative prints too*
- *Reversible Print Direction*
- *Wired Remote control*
- *Analog to digital conversion*
- *Thermal print, no chemicals required*

Specifications

Power consumption	65W
[illegible]	[illegible]
[illegible]	[illegible]
H x W x D	14-7/16 x 8-3/8 x 14-3/16 approx.
Accessories	Wired remote control for printing

PacifiCom

IS PEOPLE"

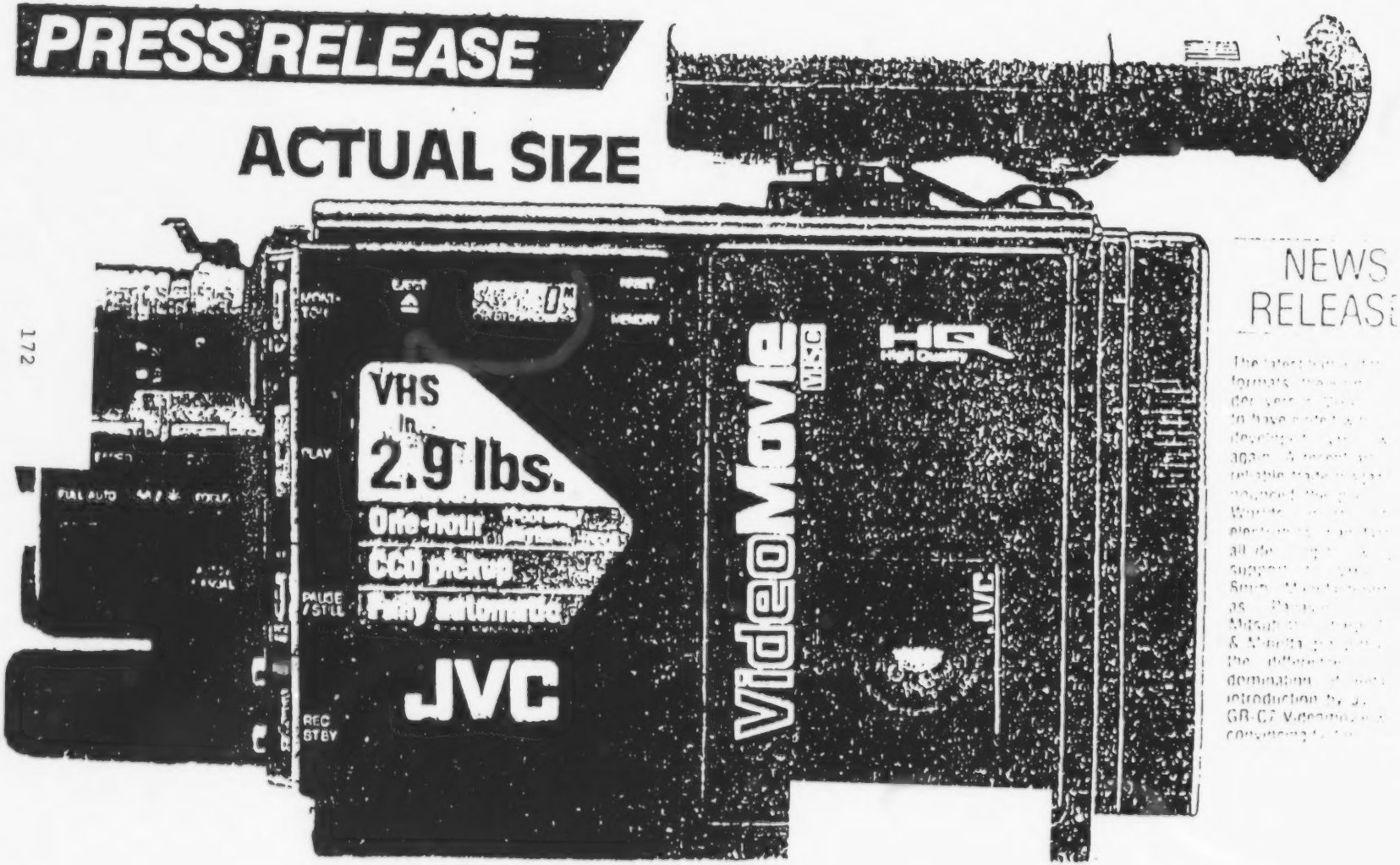
3636 East 41th Avenue

Tel: (604) 294-1881

APPENDIX "D"

PRESS RELEASE

ACTUAL SIZE



NEWS
RELEASE

The [illegible] formats [illegible] for [illegible] to have [illegible] designed [illegible] again. A [illegible] reliable [illegible] required [illegible] Weight [illegible] picture [illegible] all the [illegible] support [illegible] Smart [illegible] as [illegible] Manual [illegible] & Video [illegible] the [illegible] domination [illegible] introduction [illegible] GR-C7 Videomovie [illegible] convenient [illegible]

SANYO

THE CHOICE

VM8 *8mm Format All-In-One Video Camcorder*

AF Auto Focus

Sanyo brings you the latest in technology and convenience with this compact camcorder in the new universally accepted 8mm format. Now you can record up to 2 hours on a tape that's only about the size of an audio cassette. Focussing is easy - the camcorder does it for you. And Sanyo's CCD image sensor ensures top quality pictures with high resolution, even if you record under low lights.

☐ **8mm all-in-one camcorder.** Easy recording on 8mm format compact cassettes.

Up to 120 minute recording time lets you get it all on tape.

☐ **CCD Image Sensor** for superb picture quality. Charge coupled device semi-conductor image sensor replaces outdated saticon and vidicon pick-up tubes. The CCD system delivers sharper resolution and more precise colour fidelity than ever before.

☐ **Auto Focus** automatically provides optimum focus setting, leaving you free to concentrate on your subject.

☐ **RV multi-connector (VA58).** Simply attach to your T.V. and plug into Sanyo's 8mm camcorder for playback.

☐ **Slow Motion and Still Frame on playback.**

☐ **Power Zoom lens** (12 - 72 mm)

☐ **Minimum illumination 19 lux.** Records even in low-light situations.

Electronic viewfinder lets you see exactly what you're shooting.

☐ **Start/Stop Button** on the hand grip lets you shoot easily at low angles.

☐ **Rechargeable Battery Pack** operates up to 60 minutes continuously and can be recharged.

☐ **Edit position switch and flying erase head** for smooth, precise editing.

☐ **Dimensions:** (W x H x D) 13 x 18 x 35cm

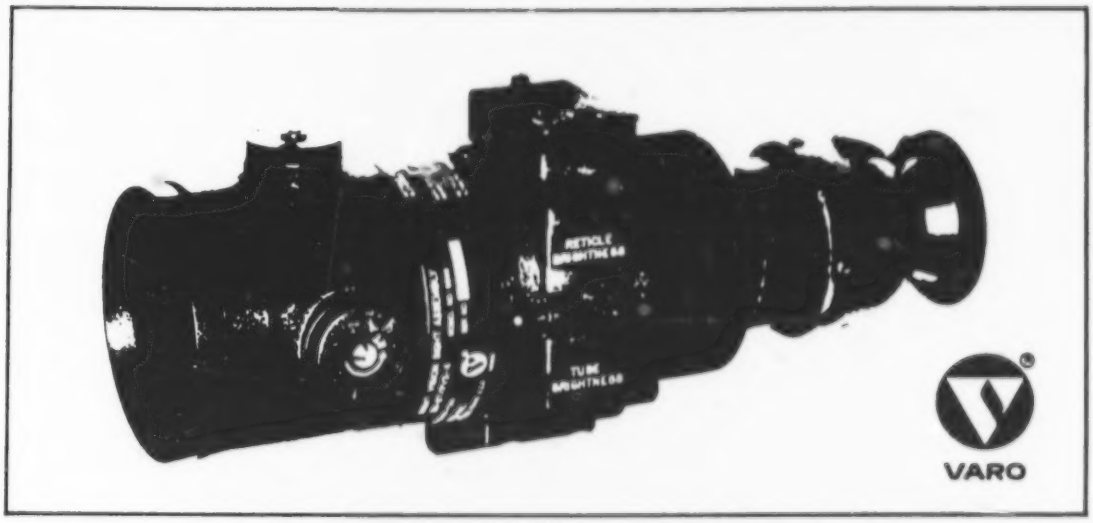
☐ **Weight:** 2.3 kg (without battery and cassette).

☐ **Earphone jack, remote jack, mic jack.**

SUPPLIED ACCESSORIES:
Earphone, carrying handle, shoulder strap, accessory kit including battery pack (NP22), battery charger, AC pack RF multi-connector, camera head cover.

OPTIONAL ACCESSORIES:
Battery Pack (NP22)
Carrying Case
8mm Cassettes (90 min. & 120 min.)

APPENDIX "E"



2nd GENERATION STARLIGHT SCOPE, AN/PVS-4

Model 9866

The Second Generation Starlight Scope is a light weight passive night vision sight using a Varo produced 25mm micro-channel plate inverter intensifier tube. The sight is easily attached to a number of different weapons or may be hand held for night reconnaissance.

An adjustable internally projected reticle and interchangeable reticle patterns allow the sight to be bore-sighted to the various weapons without having to move the sight.

Image tube gain and reticle brightness are manually adjustable to compensate for different levels of ambient lighting.

Automatic Gain Control circuitry is employed to automatically maintain the viewed scene illumination constant during periods of changing light level conditions such as the period from sunset to full darkness.

The tube features muzzle-flash protection which prevents the tube from being damaged by high intensity short duration flashes of light. The flash protection circuit is designed to recover in time for the observer to see the round hit the target.

Optional features available include "AA" battery adapter, 5x biocular eyepiece for viewing with both eyes, 35mm SLR relay and 16mm video relay for night photography.

SPECIFICATIONS

OPTICAL

Magnification	3.7x
Field of View	14° 30'
Focus Range	25m to infinity
Objective	
Focal Length	95mm
T Number	1.6
MTF	70% @ 40 lp/mm
Eyepiece	
Focal Length	25mm
Eye Relief	34mm
Diopter Range	+4 / -5

MECHANICAL

Length	24cm
Width	12cm
Height	12cm
Weight	1.7kg
Mounting	use-block bracket

ELECTRICAL

Power	25 ma @ 2.65 VDC
Battery Life	12 hrs

ENVIRONMENTAL

	operating	non-operating
Temperature	-65°F to +115°F	-65°F to +155°F
Humidity	98%	98%
Altitude	to 10,000 ft	to 40,000 ft

IMAGE TUBE

Type	25mm microchannel inverter
Resolution	30 lp/mm
Photocathode Response	S-20R

SYSTEM RESOLUTION

100% Contrast	
.001 lux	1.8 lp/mr
.1 lux	2.6 lp/mr
30% Contrast	
.001 lux	1.2 lp/mr
.1 lux	2.2 lp/mr

SPECIAL SERVICES COMPANY
Texas Bank Bldg., Suite 311-25 • 1919 S. Shiloh Rd.
Garland, TX 75042 • 214-840-0867

Revised
May 14, 1985

Varo Night Vision • Texas Instruments (FLIR) • H & K Firearms • Pelican Cases • Armored Limousines

THE NEWEST AND LATEST TECHNOLOGY SYSTEM TO INCREASE USER SAFETY.

THE NOCTRON V

Model 9878
2nd GENERATION
Night Vision Device

APPLICATIONS

- Handheld surveillance for facility, airport and border security.
- Low-light level photography with 35mm, 16mm, and TV systems.
- Observation of nocturnal behavior of birds, animals and insects.
- Navigation Aid for boats and vessels.

FEATURES

- Superior images with minimized bloom and streaking resulting from high quality optics and variable gain second generation tube technology.
- Rapid interchangeability of all accessories, even in the dark, with unique bayonet adapters.
- Observer fatigue reduced through human engineering of balance and display characteristics.
- Battery powered with 2 "AA" batteries, with a built-in battery power indicator.
- Automatic circuit protects against accidental exposure of the tube to very high light levels.
- Compatibility with most commercial 35mm and TV camera lenses provides the user with greatly enhanced flexibility.

System Characteristics (Standard 135mm f/2.8 lenses and biocular eyepiece)

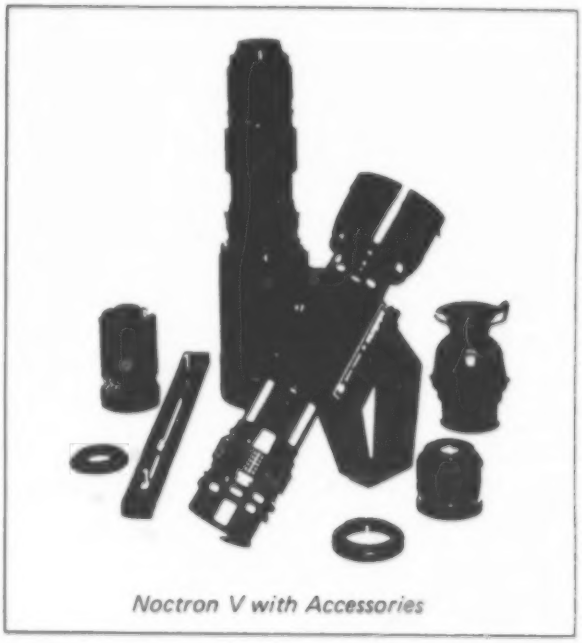
	Objective FL (mm)	Magnification	Field of View
Basic unit with 5x	135	3x	10.6°
Biocular eyepiece	300	6.4x	4.8°
Basic unit with 10x	135	6.4x	10.6°
Monocular eyepiece	300	11.5x	4.8°

Tube Gain	45 - 85,000	
Dimensions (std unit)	12.6" x 3.1" x 8.3"	(32 x 8 x 21 cm)
Weight (std unit)	4.36 lbs.	(1.98 kgm)
(w/monocular eyepiece)	3.37 lbs.	(1.53 kgm)

Range (meters)	Detect	Recog.
Man	629	482
Vehicle	867	643

SYSTEM RESOLUTION (lp/mr)

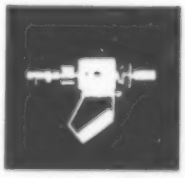
100% Contrast		30% Contrast	
0.1 lux	3.02	0.1 lux	2.16
0.001 lux	1.72	0.001 lux	1.08



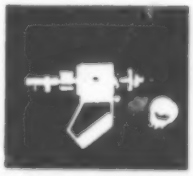
Noctron V with Accessories

Optional Configurations and Accessories

Standard Configuration



10x Monocular Eyepiece



35mm SLR Camera with f/1.2 relay

5x Biocular and 300mm f/3.2 lens

135mm f/2.8 lens, IR lightsource, monocular eyepiece

16mm movie camera with f/1.2 relay

OTHER ACCESSORIES: Telephoto lenses, lens adapters, tripods, 12 volt vehicle power adapter, car window mounting bracket

VARO, INC., ELECTRON DEVICES DIVISION, 2203 W. WALNUT ST., P.O. BOX 469014, GARLAND, TEXAS 75046-9014 (214) 487-4100
(TWX) 9108605093 VAROINC GARL (TELEX) 163165 VAROI UT

VARO

APPENDIX "F"

Cast a new light on a dark subject

Night vision systems, infrared beacons and innovative electro-optics

The Dark Invader™ series of night vision viewers let you see sharp, detailed images in ultra-low light and in *total* darkness. The 55,000 X light gain is enhanced by a special Infrared Spot Illuminator that produces a theatrical spotlighting effect visible only through the viewer. Compact and lightweight, the units attach to 35mm SLR and TV cameras as well as telephoto lenses and Cat. lenses for long range applications.

For finding your way at night, we also supply infrared marking beacons and sophisticated covert radio activated helicopter landing systems.

The capability continues. We pride ourselves as electro-optic innovators. We have successfully undertaken many special defense and security related projects and welcome the challenge of solving your custom configuration. Give us a call for products in our catalog or for that special assignment.

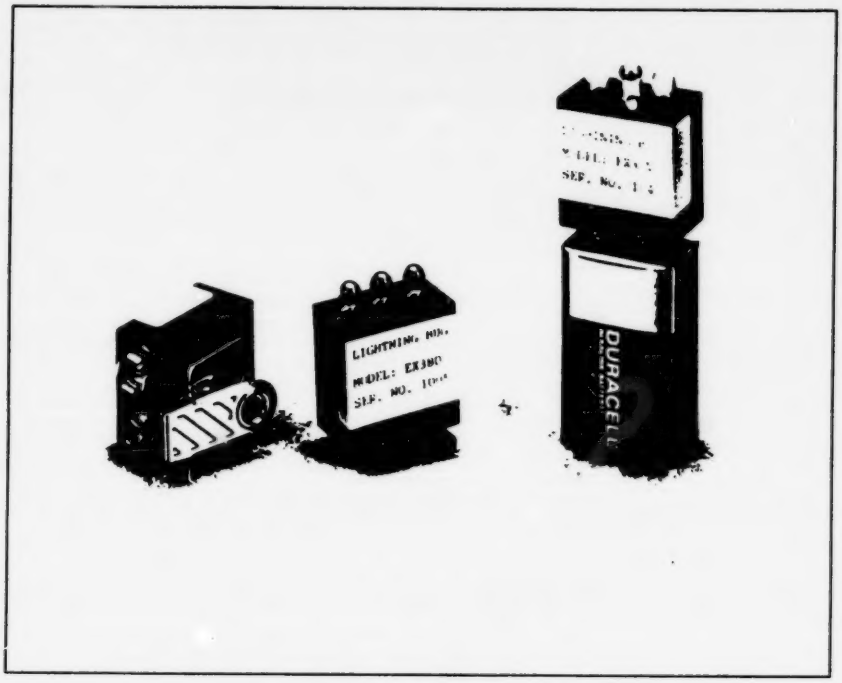
B.E. Meyers & Company

17525 N.E. 67th Court,
Redmond, WA 98052 (206) 881-6648

Circle No. 90 On Reader Information Card

APPENDIX "G"

LIGHTNING BUG



Heavy Duty Clip Optional

The LIGHTNING BUG is an Infrared Strobe to be used with Night Vision Equipment for tagging and marking. Housed in a durable hermetically sealed daillyl phthalate case, the LIGHTNING BUG comes in 2 wave length ranges (930-970nm and 840 to 920nm)*. Generating a near square wave light pulse of 30 milliseconds for the 40, 60, 80, and 120 PPM (Pulse Per Minute) or a 35% duty cycle for the CW model.

Tests have proven 30 millisecond pulses provide the optimum battery life and night vision equipment response. Using a standard off-the-shelf 9 volt alkaline battery each LIGHTNING BUG EX3 supplies a minimum of 150 mW/sr (300 mW/sr typ) of infrared light after 10 hours of operation.

Every LIGHTNING BUG is tested to extreme specifications. Only the highest quality components are used, allowing us to give one full year warranty against everything except loss.

The LIGHTNING BUG Infrared Covert Strobe easily penetrates most types of clothing, fabrics, vegetation, cardboard, styrofoam and water to a limited depth.

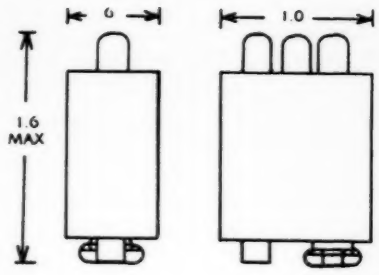
*** Special wavelength available on request.**

LAW ENFORCEMENT AND MILITARY APPLICATIONS:

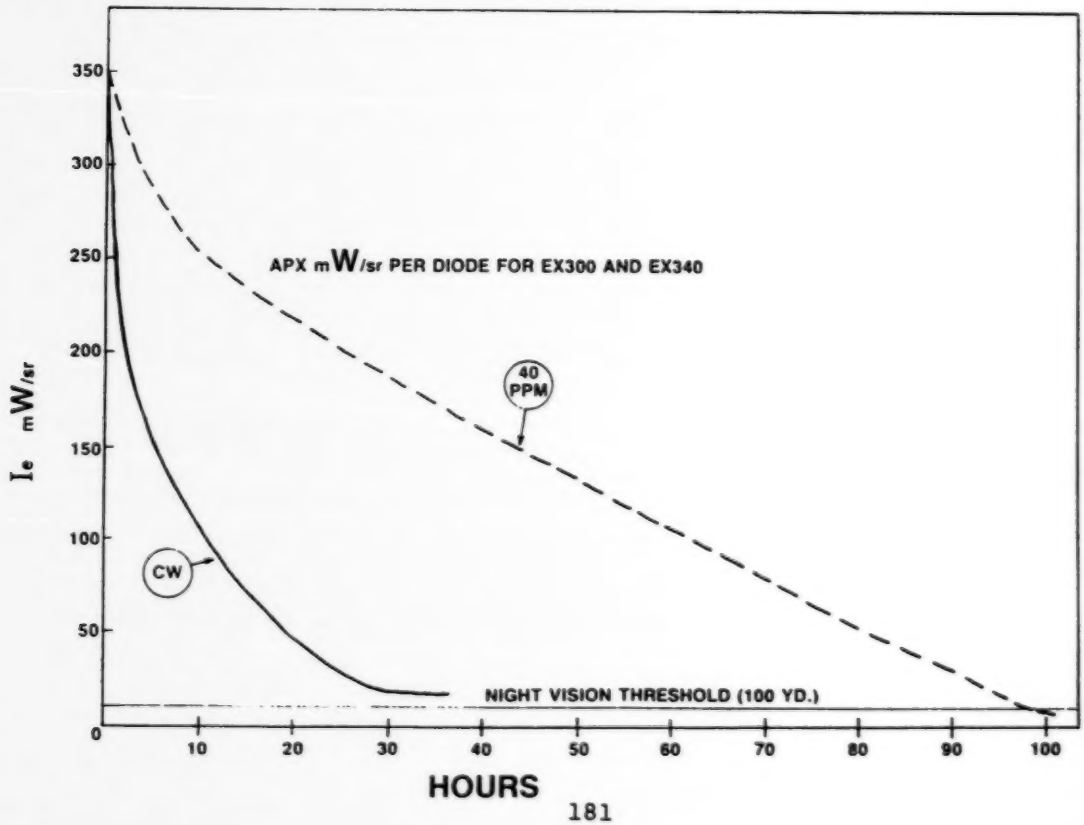
- Search and Rescue
- Night Aerial Drops
- Identification of Friend or Foe
- Trail Markers
- Landing Areas
- Personnel Markers
- Border Patrol
- Canine Units
- S.W.A.T.
- Vehicle Identification
- Location Tag
- Signalling

LIGHTNING BUG

DESCRIPTION	MODEL NO. (850-920NM)*	MODEL NO. (930-970NM)*
40 PPM	EX340	L140
60 PPM	EX360	L160
80 PPM	EX380	L180
120PPM	EX320	L120
CW	EX300	L100
VARIABLE	EX30V	L10V



* Special wavelength available on request



APPENDIX "H"

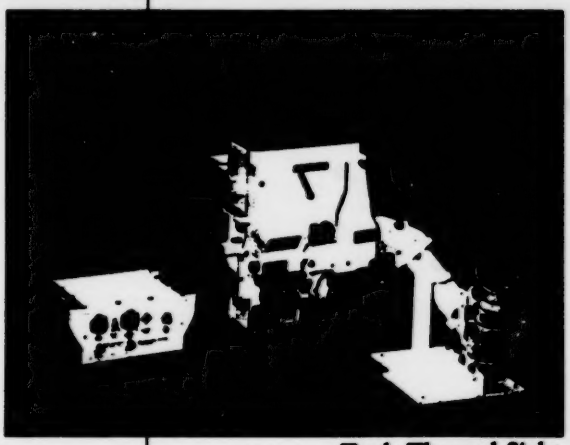
What is Forward-Looking Infrared?

Forward-looking infrared, or FLIR as it is commonly called, is an electro-optics sensor that literally takes the dark out of night. By sensing variations in the thermal radiation (heat energy) patterns of a scene, or object, FLIR makes it possible to "see" at night. Since it is independent of the absence or presence of light, FLIR also makes it possible to "see" through smoke, haze, and most adverse weather conditions and is, therefore, highly useful during daylight hours when these conditions exist.

How Does FLIR Work?

All objects, natural or man-made, emit and reflect electromagnetic energy. This energy, characterized by wavelength, is represented on the electromagnetic spectrum shown opposite. The most familiar portion of this spectrum is the area between 0.4 and 0.7 micrometer where the wavelength of the energy is visible to the human eye. All other sections of the spectrum (for instance, gamma rays, X-rays, and microwaves) are invisible to the human eye and can only be detected by special sensors. An infrared sensor system is such a special sensor; it senses thermal energy and translates this energy into an image the eye can see. A more detailed explanation of this process is included later in this brochure.

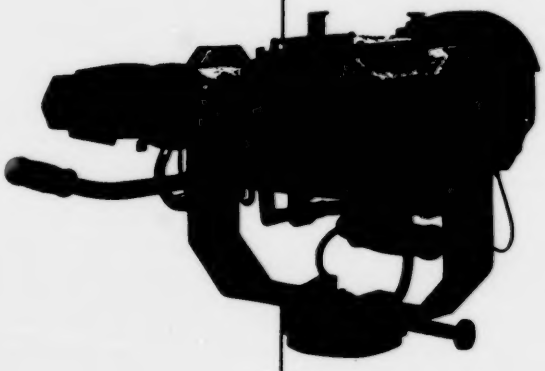
Typical Thermal Imaging/FLIR Systems



Tank Thermal Sight

Manportable Missile Sight

Airborne Surveillance System

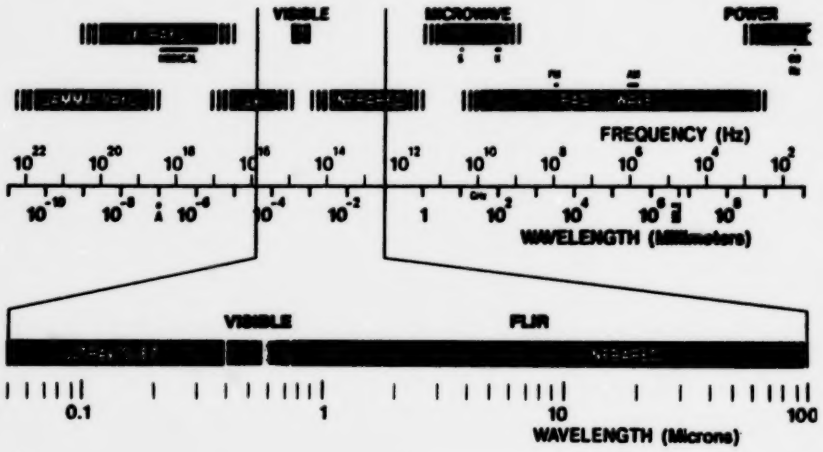


Shipboard Surveillance System

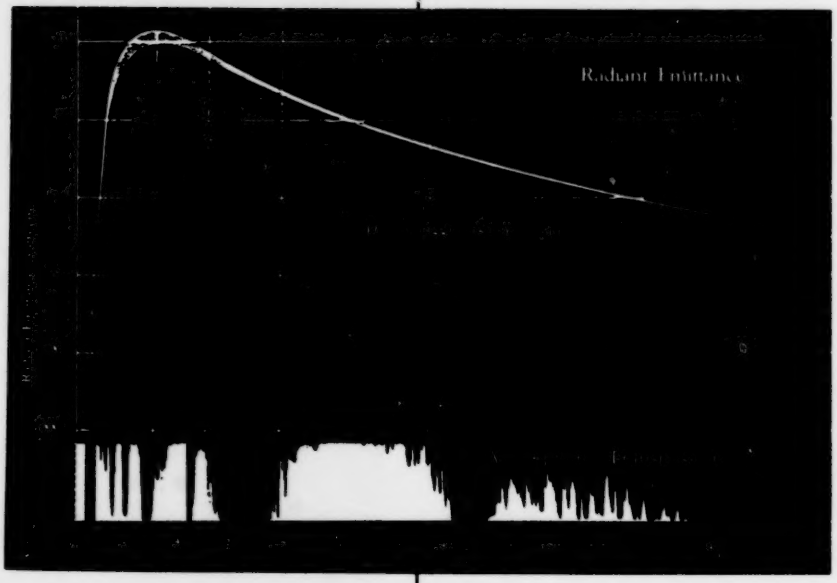
All objects whose temperatures are above absolute zero (−273°C) emit infrared radiation. The infrared region of the spectrum lies just above the visible wavelength region. Although certain wavelengths in the IR region are strongly absorbed by the atmosphere, two atmospheric "windows" exist where this absorbtion is relatively mild and are shown in the radiant emittance chart. These "windows" exist between 3 and 5 micrometers and between 7.5 and 13 micrometers.

The quantity and wavelength distribution of IR energy is determined, primarily, by the temperature of the radiation object. The temperature of the earth, and objects near the earth, is such that most of its radiation is within the boundaries of the 7.5- to 13-micrometer window. Detector devices and related materials and equipment have been developed to take advantage of this natural coincidence of maximum radiated power and maximum atmospheric transmission efficiency.

Electromagnetic Spectrum



Radiant Emittance



APPENDIX "I"

PELCO

PINHOLE LENS
MODEL MFJP9.5, MFJP9.5R, MFJP11

* DISCREET SURVEILLANCE LENSES
* 2/3" FORMAT
* f/3.5 to f/16
* STANDARD C MOUNT
* EXTREMELY FUNCTIONAL

MFJP9.5

MFJP9.5R
(FOR RIGHT ANGLE VIEWING)

The **MFJP9.5, MFJP9.5R** and **MFJP11 Pinhole Lenses** provide the function of extremely discreet surveillance without exposing the CCTV camera. Requiring a small hole of less than 1/10 of an inch, the **Pinhole Lens** is ideally suited for applications where an exposed camera may deter desired surveillance.

The **Pinhole Lenses** are designed for 2/3" format cameras, and are available in a straight configuration **(MFJP9.5, MFJP11)** and right angle configuration **(MFJP9.5R)**.

All models offer quick and easy installation for a multitude of discreet surveillance installations.

SPECIFICATIONS

MODELS

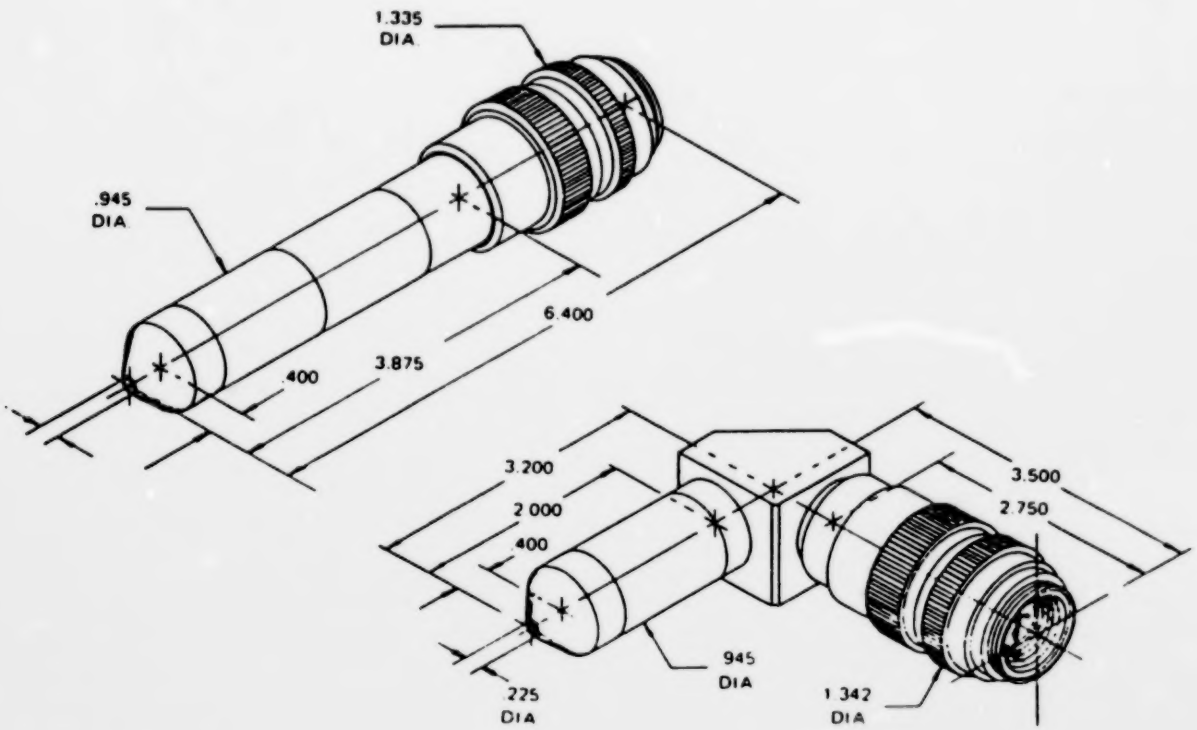
MFJP9.5	: Straight Pinhole Lens, f/3.5, 9.5mm
MFJP9.5R	: Right Angle Pinhole Lens, f/3.5, 9.5mm
MFJP11	: Straight Pinhole Lens, f/4.0, 11mm

OPTICAL

FOCAL LENGTH:	: 9.5mm, 11mm
APERATURE RANGE	: f/3.5 to f/16
FIELD OF VIEW	: (Horizontal) 51° Straight, 53° Right Angle
MINIMUM FOCUSING DISTANCE	: 58" (1.47m) Straight, 78" (1.9m) right angle
MOUNTING	: 16mm C Mount
FOCAL DISTANCE	: .690
VIDICON FORMAT	: 2/3

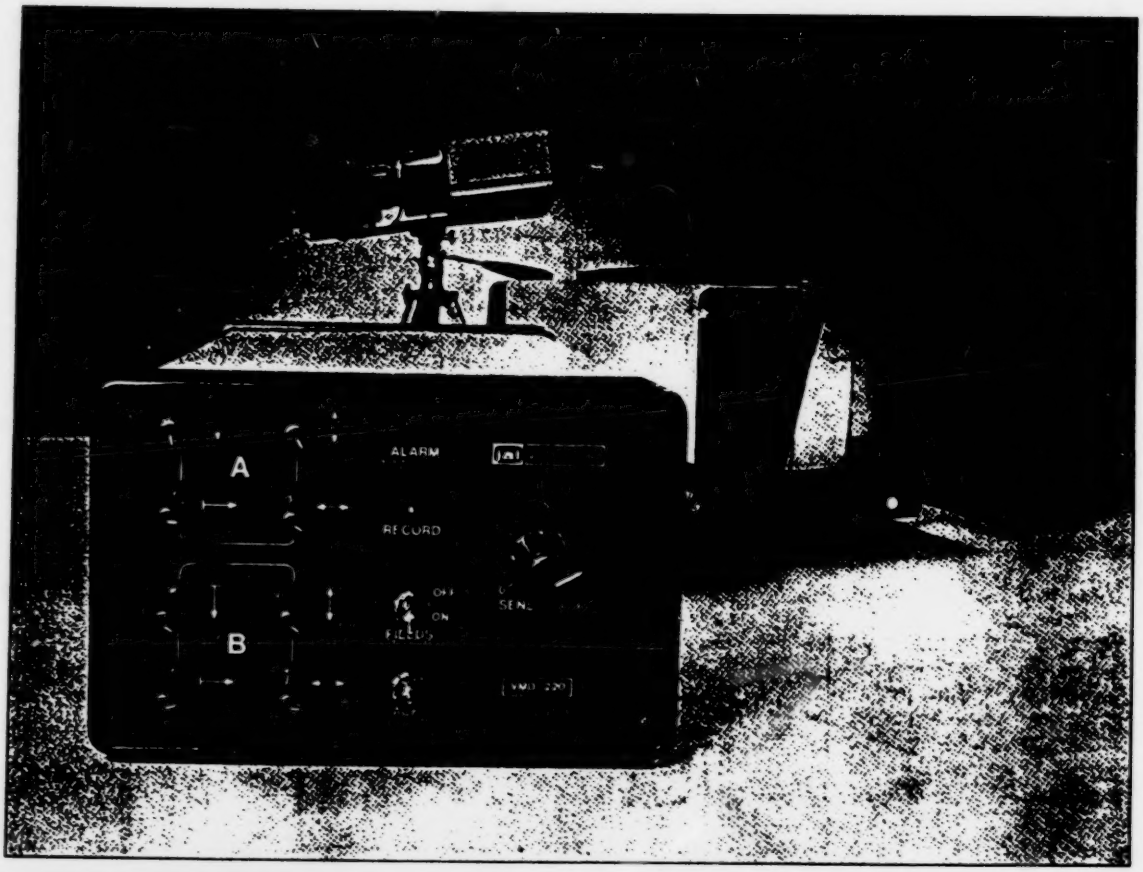
MECHANICAL:

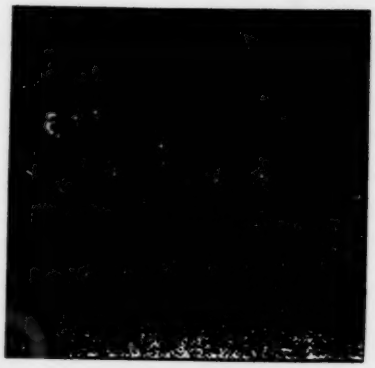
SIZE	: See Drawing Below
WEIGHT	: 7 oz. (198 gr)



APPENDIX "J"

JAI VIDEO MOTION DETECTOR





"The new JAI Video Motion Detector handles your outdoor guarding tasks - even under Low Light Level conditions"

Outdoor
The VMD 220's dual-sensor-field system provides security against weather conditioned alarm activations.

Low Light Level conditions
The good signal to noise ratio of the VMD 220 permits operation with the Low Light Level camera system.

The VMD 220 works with the complete JAI range of:

- Low Light Level Cameras
- Video Guard Cameras
- Video Guard Control Systems
- Auto Video Recording
- Date/Time Generator
- Mobile Cameras
- Multi Camera Systems

Outdoor performance.
Most Video Motion Detectors (VMD) cannot be used outdoor, because they are being disturbed by light changes. A cloud covering the sun or the change of light direction during the day cause video signal changes, that detectors till now have percepted as a reason for alarm.

The dual-sensor-field system of the VMD 220 solves this problem. One of the fields serves as light reference area, and the other as the actual alarm area. Therefore no alarm will arise if a light change occurs in both sensor fields. The result is a considerable improvement of the function for outdoor applications by reducing the number of false alarms.

Low Light Level Applications.
The inherent noise level of most VMDs excludes the possibility of Low Light Level operation. The JAI experience in this field, however, has made it natural to design the JAI VMD so that LLL operation becomes a valuable feature.

Consequently, the signal to noise ratio has been improved to secure good performance under Low Light Level conditions.

The success of the outdoor and LLL application depends on the choise of the reference field. The position and size of the field is chosen by you. The best choise is an area with the same character and illumination as the one of the alarm sensor field, but without any movement occuring.

The VMD uses the average value of the sensor field as input. Therefore, the sensitivity is highly dependant on the size of the field, and the best result will be achieved by working with sensor fields as small as possible.

The JAI VMD is supplied with an automatic leveling circuit for each sensor field to ensure the same sensitivity for changes in both bright and dark parts of the scene. The sensor fields are only shown on the monitor when an alarm is activated or when the operator wants to check or adjust size and position.

Mobile Application:
The VMD has been built into a ruggedized weatherproof portable box. The unit is automatically switchable from 110V AC to 12V DC, and is completely fitted for one channel operation.

AVAILABLE IN UNITED STATES FROM:

SPECIAL SERVICES COMPANY
REPRESENTING VARO NIGHT VISION
TEXAS INSTRUMENTS THERMAL IMAGING & H & K FIREARMS
TEXAS BANK BUILDING SUITE 311-25
1919 S. SHILOH RD
GARLAND TEXAS 75042
MERWYN SIMPSON
214-840-0867

jai

jørgen andersen ingeniørfirma a/s

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JAI Electro-Optical (UK) Ltd.
Unit 1, Tavistock Industrial Est.
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Telefax (0734) 34 56 94

West Germany:
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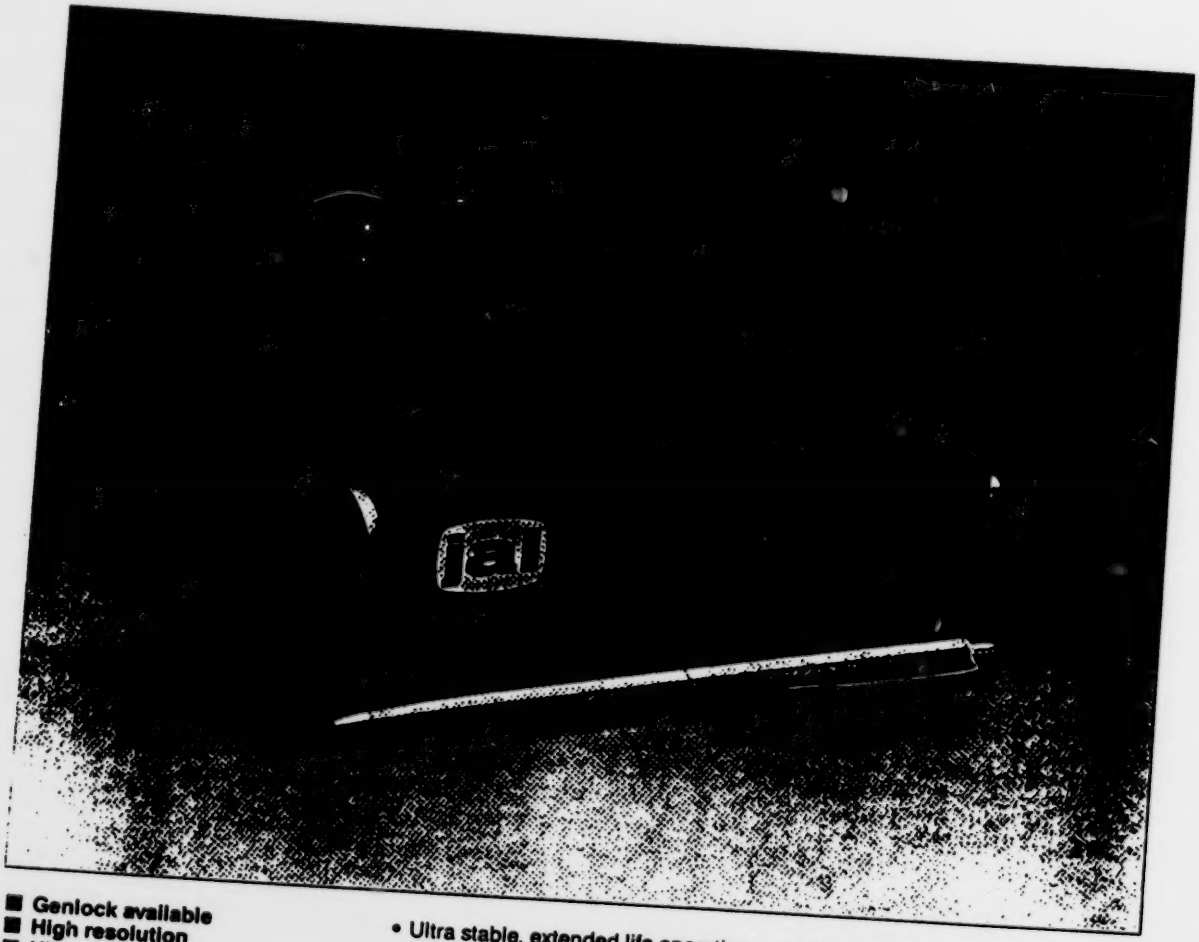
8, Hölderlinstrasse - 6500 Mainz 1
West Germany
Phone (6131) 530 91/92
Telex 4187245 jai d
Telefax (6131) 57 22 63

APPENDIX "K"

JAI 712 CCD

MINIATURE VIDEO CAMERA



- **Genlock available**
- **High resolution**
- **High sensitivity**
- **Shock and vibration resistant**
- **Solid state design for stability and maintenance free operation**

Features

- CCD (Charge Coupled Device) solid state image sensor replaces tube type pick up and provides extended life and improved stability
- Miniaturized design is only $1\frac{1}{8}$" high by $1\frac{11}{16}$" wide by $2\frac{7}{8}$" deep and weights just 4.1 ounces
- Ultra stable, extended life operation due to completely solid state componentry with virtually no maintenance
- Low lag and high image burn resistance
- Precise image geometry
- Shock and vibration resistance exceeds all tube cameras
- Instant shooting with a start-up time of 1/2 second due to elimination of electron gun/pick-up tube
- Anti-magnetic properties of CCD allow camera to be used in areas with strong magnetic fields
- High sensitivity enables camera to shoot in 3 lux illumination
- Low power consumption of less than 2.3 Watts
- Special mini bayonet lens mount, C lens mounting with an optional adaptor and permant C lens mounting.

AVAILABLE IN UNITED STATES FROM:

JAI DISTRIBUTING INC.
1919 S. SHILOH RD. 225-25
GARLAND, TEXAS 75042

214-840-0417

Applications

This product is ideally suited for guard and safety supervision at such places as:

- Banks
- Government offices
- Railway or subway stations
- Airports (runways)
- Harbours (container yard guard, narcotics control and contraband supervision)
- Power plants and dams
- Rivers
- Airplanes
- Rear or sides of a truck
- Cockpit (front), wings, engines, lower body and empennage of an airplane
- Hospitals
- Underwater TV cameras
- Police stations (portable guard cameras)
- Customs house
- Maritime Safety Agency

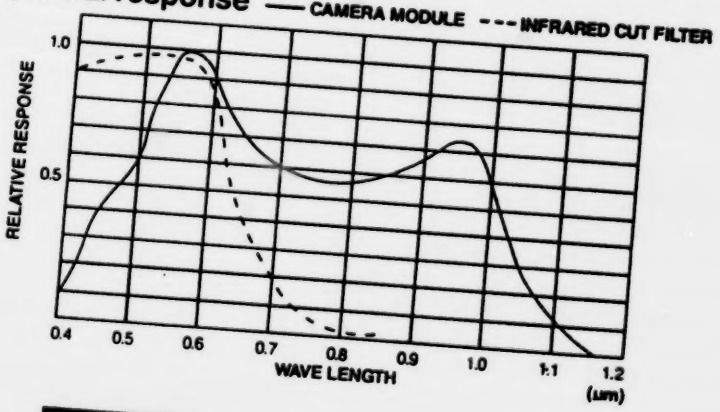
And for Industrial applications such as:

- Quality control (marking and labelling inspection)
- Pattern recognition
- Robot eyes
- Visual telephones
- INS (Information Network System)
- Mines (adits and cutting edges)
- Aerospace observation

Specifications

Pick up device:	Interline Transfer Type CCD
Picture elements:	384(H)×491(V)
Sensing area:	8.8×6.6 mm
Optical system:	Special mini bayonet/"C" mount with adaptor
Scanning system:	625 lines, 50 fields/sec, 2:1 Interlace
Video output:	1.0 Vpp sync negative, 75 Ohms
Resolution:	Horizontal: 280 lines Vertical: 350 lines
Sensitivity:	400 lux, F4 typical (3200°K, S/N 46dB with infrared cut filter)
Minimum illumination:	3 lux F 1.4 (without infrared cut filter)
Signal-to-noise ratio:	More than 46dB
Power requirement:	12 V DC with power unit
Power consumption:	2.3 W
Weight:	4.1 oz, 115 grams (without lens and power unit)
Dimensions:	1 1/8" × 1 11/16" × 2 7/8" (HWD) 28.5 mm × 43 mm × 72.5 mm (HWD)

Spectral response



jai

jørgen andersen ingeniørfirma a/s

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Phone (6131) 530 91/92
Telex 4187245 jai d
Telefax (6131) 57 22 63

JAI CCD TV Camera

Some of our daylight cameras are rather small

The invention of the CCD chip to replace the traditional camera tube in daylight TV cameras has made it possible to produce a miniature camera with a weight of 115 g (4.1 ounces) and a length of only 78 mm (3 inches). And still the light sensitivity is similar to the most advanced Vidicon camera tubes. This camera is called JAI 712 CCD.

Where can you use the CCD camera?

It is ideally suited for guard and safety surveillance of such places as banks, government offices, airports, harbours, hospitals and customs houses, as well as for industrial applications, such as quality control and robot guidance.

Better performance and versatility

The CCD chip camera provides better performance and versatility than a tube pick-up camera due to:

- Solid state components for ultra-stable extended lifetime
- Virtually maintenance-free operation.
- Low lag and high resistance to image burn.
- Precise image geometry.
- High shock/vibration resistance.
- Fast start-up time of ½ second.
- Resistance to strong magnetic fields.
- High sensitivity (down to 3 lux).
- Low power consumption (2.3 Watts).

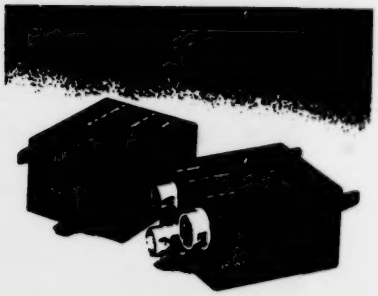
Versatility through system compatibility

To ensure optimal use of the CCD camera's potential JAI offers a wide selection of peripheral products and supporting equipment, such as monitors, control desks, power supplies, indoor/outdoor housings and lenses.

The CCD chip versus the traditional tube

Despite the small size of the CCD chip, it has several advantages over a traditional camera tube: High shock resistance, extended operational life, no start-up time and high resistance to image burn.

The use of a CCD chip instead of a traditional camera tube has made it possible to produce an ultra miniature TV camera, which is easy to install and requires virtually no maintenance.



Power unit

The power unit is a DC/DC converter which powers the camera with three different voltages. It is connected to the camera unit through a plug, and is fitted with sockets for video input, auto iris control, and 12V DC input.

Lenses

A special mini bayonet mount has been developed for the 712 CCD camera. This both reduces camera size and makes it easier to change lens.

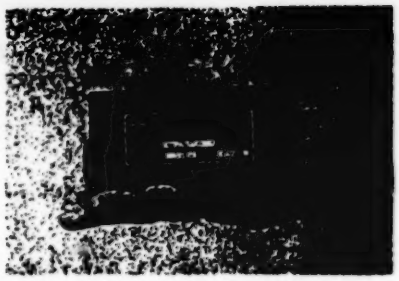
Two lenses can be mounted on this mini bayonet:
A manual iris and focus lens with a focal length of 16mm and a light value of F1:1.4.
And an auto iris fixed focal lens with a focal length of 8.5mm and a light value of F1:1.6.
These lenses may be mounted with ND and IR filters.

Lens flexibility

If the use of other lenses is required, a special C-mount adaptor or a permanent C-mount is available for JAI's 712 CCD camera. Thus JAI's entire lens programme, from long range lenses to pinhole lenses, can be used with the CCD camera.

dell·star CORPORATION

TRANSCAM



SERIES DS-801
Miniaturized CCD Transmitting Camera

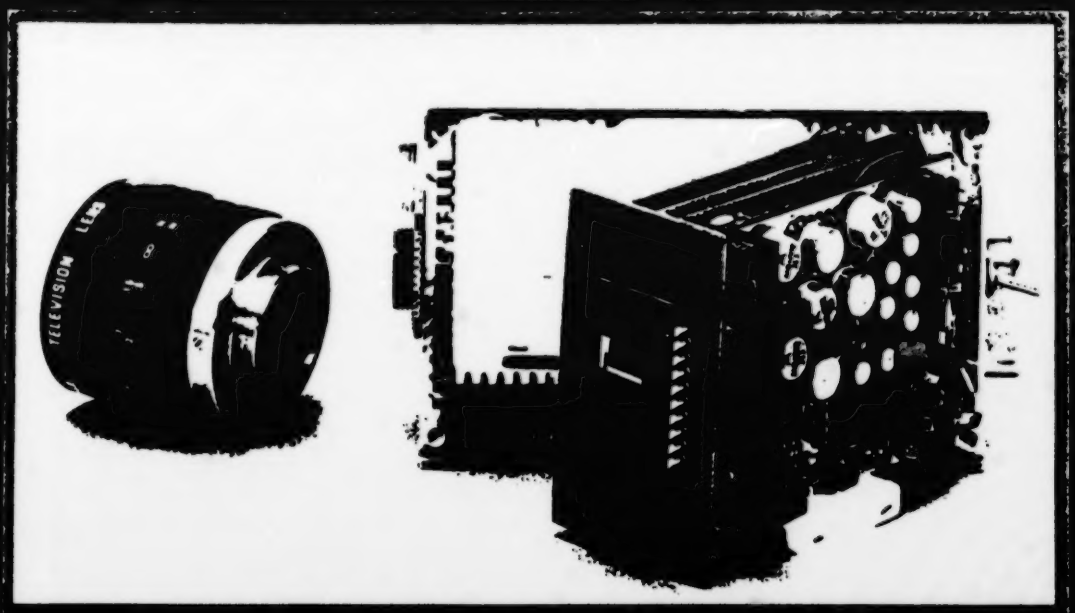
SPECIFICATIONS

FREQUENCY RANGE:	User specified - Single Channel 800 MHz to 935 MHz
FREQUENCY STABILITY:	± 0.005% Crystal Controlled-PLL
POWER OUTPUT:	See Models
RF OUTPUT IMPEDANCE:	50 OHMS (Nominal)
MODULATION:	Frequency Modulated
VIDEO FREQUENCY RESPONSE:	30 Hz To 4.2 MHz @ -3dB Points
DEVIATION:	± 5.0 MHz (Nominal)
INPUT VOLTAGE:	12 ± 10% VDC
INPUT CURRENT:	375 mA-1.6 AMP (Typical)
OPERATING TEMPERATURE:	0° To 40° (32° To 104° F)
CASE:	Machined Aluminum Anodized, Flat Black

DIMENSIONS:	2" x 2" x 4.7" (w/o connectors)
CAMERA LENS MOUNT:	Special Mini Bayonet Mount or C Mount using an CA34 C Mount Adaptor
SIGNAL SYSTEM:	NTSC or PAL (CCIR) Standards
MINIMUM ILLUMINATION:	3 Lux (0.3 Footcandles) with Fl.4, without an infrared cut filter.
SENSITIVITY:	400 Lux (40 Footcandles) with F4, 3200° k, with an infrared cut filter.
CONNECTORS:	RF Out - N Female Power In - Cable Provided
MODELS:	DS-801/05, 50 Milliwatt (17 dB) DS-801/1, 1.0 Watt (30 dB) DS-801/2, 2.0 Watt (33 dB) DS-801/4, 4.0 Watt (36 dB)

6334 EAST 13TH STREET
TULSA, OKLAHOMA 74112
TELEPHONE NO. (918) 838-1985
TELEX: 492-311

TEXAS INSTRUMENTS



TEXAS INSTRUMENTS

CCD II RS-170 HIGH RESOLUTION MONOCHROME CAMERA

CCD Microcamera From Texas Instruments

Texas Instruments demonstrates a solid state high resolution CCD camera. The camera utilizes TI's patented Virtual Phase CCD Imager technology to achieve a state-of-the-art CCD camera in terms of size, power, and performance.

Advantages:

- Small size
- Low power
- Geometric stability
- No image burn-in
- No picture lag or retention
- Ruggedized packaging
- High resolution
- No microphonics

Specifications:

Imager	CCD II; 780 × 488
Spectral response	200 to 1100 nanometers
Saturation exposure	1.1 $\mu watt/cm^2$
Pixel data rate	7.375 MHz
Dynamic range	50 DB
Video output	1 V P-P, standard composite video 1:1 OR 2:1 pseudo interlace.
Lens	Standard C mount
Power	18 V DC @ 300 ma = 5.4 Watts
Size	Width = 1.7"; Height = 3.0"; Depth = 5.0"

For Further Information Contact:

Texas Instruments Incorporated
Manager, Marketing Requirements
Electro-Optics Division
P.O. Box 660246 M/S 3177
Dallas, Texas 75266
Telephone: (214) 995-6402

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TEXAS INSTRUMENTS

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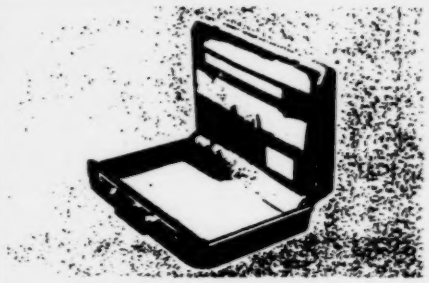
DW-9-84

CCD MICROCAMERA FROM TEXAS INSTRUMENTS

TEXAS INSTRUMENTS

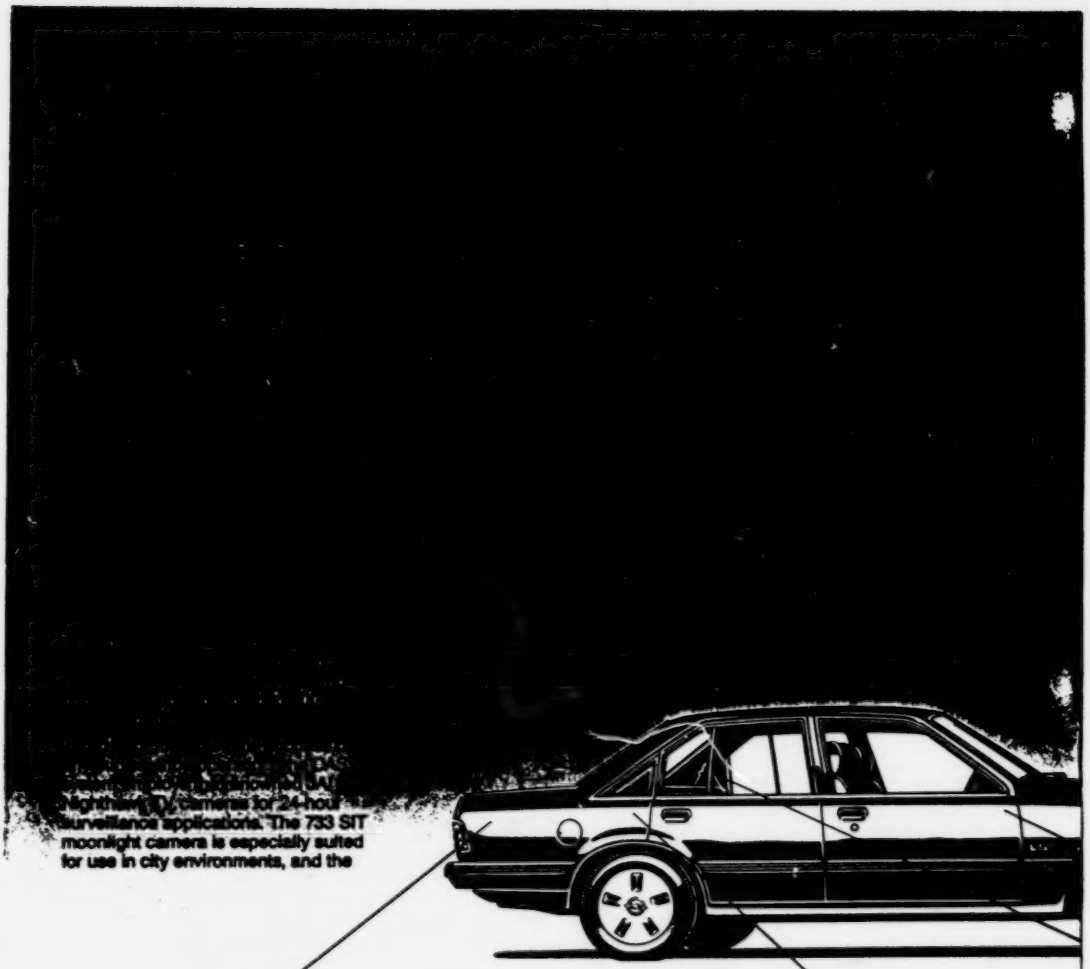
APPENDIX "L"



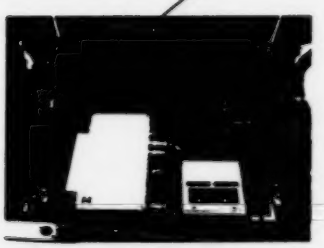
RF TV SIGNAL TRANSMITTER

Del Star's RF Transmitter Receiver enables covert or overt intelligence gathering without coaxial cable or length of transmission being affected. The 50 milliwatt transmitter enables one to receive audio and video for up to three-quarters of a mile from the transmitter. The above briefcase with built-in RF transmitter, TV camera and battery pack, is capable of transmitting both audio and video as it is viewed in this photo. Components or completed surveillience items are also available.

APPENDIX "M"



Night and day cameras for 24-hour surveillance applications. The 733 SIT moonlight camera is especially suited for use in city environments, and the



Control, Transmission and Video (CTV) Pack

All control facilities are enclosed in one compact module. This design makes the entire CTV pack easy to transfer from one location – or car – to another.

The CTV module contains individual control facilities for

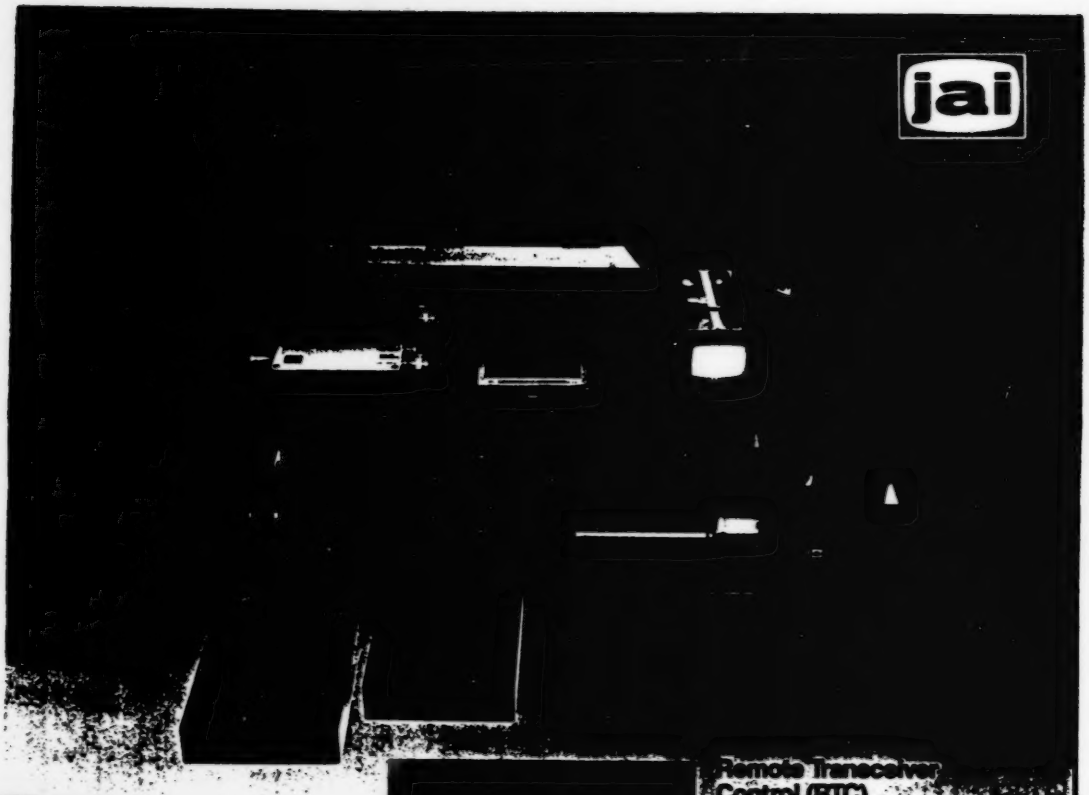
- All pan/tilt and camera functions
- The VCR and wireless remote operation
- Control receiver and video transmitter

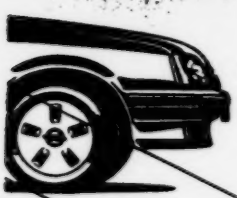
The control module is also available in a local control version which does not contain transmitter/receiver.

Pan/Tilt Mounting (PTM) Rack

This module contains the camera and has been designed for a number of applications, including fixed and interchangeable installations.
The PTM may be permanently installed – and when mounted in a

building may simply be designed to look like a ventilator cover. When installed in a sedan car, the PTM is disguised as a stereo loudspeaker. By adjusting the telescopic base and the width between the two loudspeakers, the mount assembly will fit most cars. The PTM may be purchased as a





Remote Transceiver Control (RTC)

When operated by remote control, the DAS system may be operated from a distance of up to 300 meters.
The remote transceiver control kit fits into two suitcases – one containing the video receiver and recorder, the other the operation panel. This monitor picture is identical to the one in the main system.
The remote kit runs on either a 220 V mains supply or on the built-in battery supply.

separate unit, along with the local operator and antenna kits.
When these units are pre-installed in a car, the remaining units of the DAS system may be brought in from another car. The preinstalled car will then be fully operational in less than ten minutes.

Local Operator (LO) Kit

The VG205 control panel contains all control facilities for the camera, pan/tilt and VCR on serial transmission basis. This makes the microprocessor small and reliable.
The 5" high resolution monitor in the control panel is easy to conceal when necessary.
The kit is supplied with a 3.5 meter video control cable with a small connection box.

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